TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ, APPELLANT,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FILED SEPTEMBER 20, 1938.

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INDEX.

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[fol. a] Citation, in usual form, showing service on James H. Linton et al., filed July 12, 1938, omitted in printing.

[fol. 1]

IN UNITED STATES DISTRICT COURT, CENTRAL DIVISION, WESTERN JUDICIAL DISTRICT OF MISSOURI

In Equity. No. 660

FRANK EICHHOLZ, Plaintiff,

vs.

SAM O. HARGUS, W. M. ANDERSON, JOHN S. BOYER, ALBERT D. NORTONI, John A. Ferguson, Public Service Commissioners of the State of Missouri; Roy McKittrick, Attorney-General of the State of Missouri; and B. M. Casteel, Superintendent, State Highway Patrol, Defendants

BILL OF COMPLAINT—Filed December 31, 1936

To the Honorable Judges of the District Court of the United States in and for the Central Division of the Western Judicial District of Missouri:

Frank Eichholz, a citizen and resident of the State of Missouri, bring this, his bill of complaint, against Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, and John A. Ferguson, Public Service Commissioners of the State of Missouri; Roy McKittrick, Attorney General of the State of Missouri; and B. M. Casteel, Superintendent, State Highway Patrol, all citizens and residents of the State of Missouri and the Western District thereof, and thereupon complains and avers:

I

Plaintiff now is and at all times hereinafter mentioned was a citizen of the State of Missouri and a resident of the [fol. 2] City of St. Louis; and that defendants, Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of

the State of Missouri; Roy McKittrick, Attorney General of the State of Missouri, B. M. Casteel, Superintendent, State Highway Patrol, are now and at the time of the commencement of this suit, were citizens and residents of the County of Cole in the State of Missouri and at all of said times residents and inhabitants of the Western District of Missouri.

II

This suit is an action of a civil nature; the matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00) and is a controversy between citizens of the same state, seeking to test the constitutionality of an order of the Public Service Commission of Missouri which does interfere with interstate commerce, and hence arises under the Constitution and laws of the United States, as hereinafter more particularly shown.

III

Plaintiff states that Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of the State of Missouri, were at the time of the commencement of this suit and are now the duly constituted, appointed, qualified and acting Public Service Commission of the State of Missouri charged with the duty of enforcing the provisions of an act of the Missouri Legislature, to-wit: Article 8, Chapter 33, R. S. 1929, as amended by Laws 1931, page 304; that Roy McKittrick was at the time of the filing of this suit, and is now the duly elected, qualified and acting Attorney-General of the State of Missouri, charged by law with the duty, when called upon, of enforcing the Constitution and laws of the State of Missouri; that B. M. Casteel was at the time of the filing of this [fol. 3] suit, and is now the duly appointed, qualified and acting Superintendent, State Highway Patrol, charged by law with the duty of enforcing the laws of the State of Missouri.

IV

Plaintiff states that since the 23d day of November, 1934, he has been continuously engaged in the transportation for hire of personal property as a common carrier in interstate commerce.

V

Plaintiff states he operates in the prosecution of his business as a common carrier by motor vehicles in interstate commerce a terminal building located at 511 South Second Street, St. Louis, Missouri; a terminal building located at Shawnee and Adams Street-, Kansas City, Kansas; a terminal building located at 309 North Rock Island Avenue, Wichita, Kansas; a terminal building located at 115 Eleventh Street, Des Moines, Iowa; and a terminal building located at 611 South Main Street, Burlington, Iowa; that plaintiff owns and operates thirty-seven (37) pieces of motor equipment in rendering service in the transportation of property in interstate commerce, and has leased thirty-two (32) pieces of motor equipment which he also operates in rendering service in the transportation of property between the states of Illinois, Missouri, Kansas, and Iowa.

VI

Plaintiff states that he has invested large sums of money in the terminal facilities above set out, and has invested large sums of money in motor vehicles, trucks, tractors and semi-trailers as above set out to facilitate the transportation of property by him as a common carrier; that he has established regular and convenient routes of travel for said motor vehicles between said terminals; that he maintains at said terminals agents and employees for receiving, check-[fol. 4] ing, billing, and forwarding property for transportation; that he maintains proper and sufficient motor equipment, commonly known as road trucks, for the transportation of property between terminals, and provides and maintains at said terminals motor vehicles for rendering pickup and delivery service between his terminals and consignors and consignees within the commercial area of said terminals as set out in plaintiff's tariffs now on file with the Interstate Commerce Commission.

VII

Plaintiff further states that he assembles at his terminals large numbers of shipments through the use of his pick-up equipment, which shipments are then loaded into the motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which the shipments

are destined, and are there transferred to the dock and reloaded into the various delivery trucks to be delivered to the various consignees in the commercial area of that terminal.

VIII

Plaintiff states that the Seventy-fourth Congress of the United States passed an act, approved August 9, 1935, known as the "Motor Carrier Act, 1935." Plaintiff further states that by said Act the Interstate Commerce Commission was given exclusive jurisdiction to grant certificates of convenience and necessity to motor carriers in interstate commerce; to regulate rates and service of said motor carriers in interstate commerce; that in conformity to said Motor Carrier Act of 1935 this plaintiff filed with the Interstate Commerce Commission an application on Form BMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959; filed with the Interstate Commerce Commission a schedule of rates for said transportation; and has complied with all the requirements of said "Motor Carrier Act, 1935" and the orders of the Interstate Commerce Commission.

[fol. 5] IX

Plaintiff further states that on the 23d day of November, 1934, the Public Service Commission issued to plaintiff an Interstate Permit No. T-3734, which Permit granted to plaintiff authority to operate interstate as a freight-carrying motor carrier over the highways of Missouri; that plaintiff filed with the Public Service Commission of Missouri proper insurance and paid all license fees and taxes as required by the Public Service Commission Law of Missouri, and fully complied in all respects with the Laws of Missouri and the orders of the Public Service Commission.

Plaintiff states that on July 22, 1936, the Public Service Commission instituted a proceedings to revoke the authority of Frank Eichholz, doing business as Riteway Motor Service, and holder of Interstate Permit No. T-3734 heretofore issued by the Public Service Commission of Missouri, said proceedings being Docket No. Case T-5330; that on the 10th day of December, 1936, the Commission issued its order in Case T-5330 and revoked the authority of plaintiff to operate in interstate commerce as a freight-carrying

motor carrier; that by subsequent order of said Public Service Commission the effective date of its order of December 10th was extended to December 30, 1936.

X

Plaintiff further states that on the 16th day of December, 1936, he filed with the Public Service Commission of Missouri an application for a rehearing in said Case No. T-5330, and on the 23d day of December, 1936, the Commission issued its order overruling said application for a rehearing. Plaintiff further states that under the decisions of the Courts of Appeal and the Supreme Court of Missouri no appeal can be taken to the courts of last resort in the State from orders of the Public Service Commission.

Plaintiff further states that the action of the Public Serv- [fol. 6] ice Commission in issuing said order of December 10, 1936, was unlawful, unreasonable, arbitrary and capricious in that the Public Service Commission of Missouri attempted to exercise power and authority expressly delegated by the Congress of the United States to the Interstate Commerce Commission.

Plaintiff further states that said order of the Public Service Commission issued on December 10, 1936, is a direct burden and interference with interstate commerce and deprives plaintiff of his right to engage in interstate commerce, and deprives the public of the use of plaintiff's facilities in the transportation of property in interstate commerce.

XI

Plaintiff states that because of the unwarranted and illegal assumption of authority and power by the Public Service Commission in issuing said order, the above named defendants are threatening to arrest the drivers of said plaintiff's vehicles, thereby destroying the business of the plaintiff; that the continual arresting of the drivers of the plaintiff by said defendants and the filing of information purporting to charge this plaintiff with violations of law will work irreparable injury and damage to plaintiff's property, and will cause irreparable damage to the public who are dependent on plaintiff for the transportation by plaintiff of their property; that said order of the Public Service Commission is contrary to and in violation of the Motor

Carrier Act of 1935, and is in violation of Article 3; and Sections 1, 24 and 25 of Article 4 of the Constitution of Missouri; and is in violation of Section 1 of Article 14 of the Constitution of the United States; and Section 3 of Article 1 of the Constitution of the United States.

[fol. 7] XII

Plaintiff further states that unless the above named defendants are restrained and enjoined from arresting and filing criminal charges against and prosecuting plaintiff, his drivers and employees that plaintiff will be required to defend a multiplicity of criminal actions; that plaintiff's property and business will be destroyed; that plaintiff has no other adequate remedy at law.

Wherefore, Plaintiff prays that the above defendants and each of them be temporarily and permanently enjoined and restrained from arresting, prosecuting, or assisting in the prosecution of any criminal suits against plaintiff from using the highways of the State of Missouri in the transportation of property for hire in interstate commerce by motor vehicle, and for such other relief as to the Court may seem just and proper.

Frank Eichholz, Plaintiff, by D. D. McDonald, Solicitor for Plaintiff.

[fol. 8] *Duly sworn to by Frank Eichholz. Jurat omitted in printing.*

[fol. 9] IN UNITED STATES DISTRICT COURT

NOTICE OF APPLICATION FOR TEMPORARY RESTRAINING ORDER WITH ACKNOWLEDGMENT OF SERVICE THEREON—Filed December 31, 1936

You are hereby notified that plaintiff, Frank Eichholz, will at ten o'clock A. M. on the 31st day of December, 1936, or as soon thereafter as counsel can be heard, at the Federal Court House in Kansas City, Missouri, make application to Hon. Merrill E. Otis, Judge of the District Court of the United States, Central Division, Western Judicial District of Missouri, for a restraining order to enjoin you from arresting, prosecuting, or assisting in the prosecution of

any criminal suit against the plaintiff because of his use of the highways of the State of Missouri in the transportation of property for hire in interstate commerce until some further order be made in the premises, when and where you can appear, if you see proper.

Frank Eichholz, by D. D. McDonald, His Attorney.

Received copy of the above notice together with copy of bill of complaint this 30th day of December, 1936.

James P. Boyd, General Counsel P. S. C. of Missouri. Roy McKittrick, by J. E. Taylor. Col. B. M. Casteel, by K. K. Johnson.

[fol. 10] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER, WITH RETURN OF SERVICE THEREON—Filed January 5, 1937

This matter coming on to be heard upon the petition of Frank Eichholz, plaintiff herein, and upon reading the petition it appearing that upon the facts stated in the petition plaintiff is entitled to the relief prayed for, it is ordered that a temporary restraining order be granted herein enjoining the defendants, their servants, agents, and employees from arresting, prosecuting, or assisting in the prosecuting of any criminal suit against plaintiff for using the highways of the State of Missouri in the transportation of property for hire by motor vehicles until the 11th day of January, 1937, and until the further orders of this Court.

Merrill E. Otis, Judge of the United States District Court, Central Division of the Western District of Missouri.

Marshal's Return

I do Hereby Certify That I received this writ at Jefferson City, Mo. on Dec. 31, 1936, and executed the within Writ, by leaving a copy of the original writ with Captain R. E. Moore, who is authorized to accept service in the absence of the Supt. B. M. Casteel, of the Highway Patrol of the State of Missouri, and on Dec. 31, 1936, at Jefferson City, Mo. I left a copy of the within Writ at the office of Sam O. Hargus, Chairman of the Public Service Com. of the State of Mo., with his Sect. Robert E. Holliway, in the absence

of the above named, and in the absence of the within named Roy McKittrick, Attorney General of the State of Mo. I left a copy of the within Writ at the office of the above named [fol. 11] in Jefferson City, Mo. with his Sect. J. L. Retzenthaler, who is authorized to accept service in the absence of the within named.

All done in Cole County, in said Division and District on Dec. 31, 1936.

H. L. Dillingham, U. S. Marshal, by J. H. Polson, Deputy.

[File endorsement omitted.]

[fol. 12] IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, SAM O. HARGUS, W. M. ANDERSON, JOHN S. BOYER, ALBERT D. NORTONI, JOHN A. FERGUSON, CONSTITUENT MEMBERS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI—Filed January 22, 1937

Come now the Public Service Commission of the State of Missouri and its constituent members, Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Defendants herein, and for separate answer to plaintiff's Bill state:

I

These Defendants admit the allegations contained in the first paragraph of the Bill.

II

Admit that this suit is an action of a civil nature; deny the dispute herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00); deny it is a controversy between citizens of the same state seeking to test the constitutionality of an order of the Public Service [fol. 13] Commission of Missouri which interferes with interstate commerce, and deny that this question arises under the Constitution and laws of the United States, as alleged in paragraph II of the Bill.

III

These Defendants admit the allegations contained in the third paragraph of the Bill.

IV

These Defendants deny that since November 23, 1934 plaintiff has been continuously engaged in the transportation for hire of personal property as a common carrier in interstate commerce, as alleged in paragraph IV of the Bill.

V

These Defendants answering the fifth paragraph of the Bill specifically deny plaintiff operates a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas.

Further answering, these Defendants say they have no information sufficient to form a belief as to the allegation contained in the fifth paragraph of the Bill as to the plaintiff operating a terminal building located at 511 South Second Street, St. Louis, Missouri, a terminal building located at 309 North Rock Island Avenue, Wichita, Kansas, a terminal building located at 115 Eleventh Street, Des Moines, Iowa, and a terminal building located at 611 South Main Street, Burlington, Iowa, and therefore deny that plaintiff operates said terminal buildings.

Further answering, these Defendants state they have no information sufficient to form a belief as to the number of pieces of motor equipment plaintiff has in rendering service in the transportation of property for hire nor the number [fol. 14] of pieces of motor equipment plaintiff has leased for said purpose and therefore deny plaintiff owns and operates thirty-seven (37) pieces of motor equipment in rendering service in the transportation of property in interstate commerce, and has leased thirty-two pieces (32) of motor equipment which he also operates in rendering service in the transportation of property between the States of Illinois, Missouri, Kansas, and Iowa.

VI

These Defendants answering the sixth paragraph of the Bill say they have no information sufficient to form a belief as to the allegations therein contained and therefore deny plaintiff has invested large sums of money in motor vehicles, trucks, tractors and semi-trailers, and in terminal facilities; that he has established regular and convenient routes of travel for said motor vehicles between the terminals alleged in the Bill; that he maintains at said terminals agents and

employees for receiving, checking, billing, and forwarding property for transportation; that he maintains proper and sufficient motor equipment, commonly known as road trucks, for the transportation of property between terminals, and provides and maintains at said terminals motor vehicles for rendering pick-up and delivery service between his terminals and consignors and consignees, as set out in the sixth paragraph of the Bill; specifically deny that he maintains said motor vehicles, both highway and terminal motor vehicles, as set out in plaintiff's tariff now on file with the Interstate Commerce Commission, as alleged in the sixth paragraph of the Bill.

VII

These Defendants further answering state they have no information sufficient to form a belief as to the allegations contained in the seventh paragraph of the Bill and therefore deny that plaintiff assembles at his terminals large numbers of shipments through the use of his pick-up equipment, [fol. 15] which shipments are then loaded into the motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which the shipments are destined, and are there transferred to the dock and reloaded into the various delivery trucks to be delivered to the various consignees in the commercial areas, as alleged in plaintiff's Bill. Specifically aver the fact to be that these Defendants that plaintiff operates in the prosecution of his business a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas, as alleged in the fifth paragraph and referred to in the seventh paragraph of the Bill, but avers the fact to be that plaintiff does not operate a terminal building at Shawnee and Adams Streets, Kansas City, Kansas and does not own and operate pick-up equipment at said terminal *at said terminal* through which he assembles large numbers of shipments, which shipments are then loaded into motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which said shipments are destined, as alleged in the seventh paragraph and referred to in the fifth paragraph of the Bill.

VIII

These Defendants further answering state they admit the Seventy-Fourth Congress of the United States passed an Act, approved August 9, 1935, known as "Motor Carrier

Act, 1935." Admit that by said Act the Interstate Commerce Commission was given exclusive jurisdiction to grant certificates of convenience and necessity to common carriers by motor vehicles in interstate commerce, to regulate rates and service of said carriers in interstate commerce. Further answering, these Defendants say they have no information upon which to form a belief as to whether plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form BMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959, and has filed with the Interstate Commerce Commission a [fol. 16] schedule of rates for said transportation, and, therefore, deny that plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form BMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959; deny that plaintiff filed with the Interstate Commerce Commission a schedule of rates for interstate transportation, and specifically deny that plaintiff has complied with all requirements of said Motor Carrier Act of 1935 and the orders of the Interstate Commerce Commission, as alleged in the eighth paragraph of the Bill.

IX

Answering the allegations in the ninth paragraph of the Bill, these Defendants admit that on November 23, 1934 the Public Service Commission of Missouri issued to plaintiff an Interstate Permit No. T-3734; admit that plaintiff filed with the Public Service Commission insurance policies and paid license fees and taxes, as required by the Public Service Commission Law of Missouri, for the transportation of property for hire over the highways of the State of Missouri for interstate movements and in interstate commerce only. Further answering, these Defendants specifically deny that plaintiff has fully complied in all respects with the laws of the State of Missouri and the orders of the Public Service Commission of Missouri.

Further answering, these Defendants admit that on July 22, 1936 the Public Service Commission instituted a proceeding to revoke the authority of Frank Eicholz, doing business as Riteway Motor Service, and holder of Interstate Permit No. T-3734 theretofore issued by the Public Service Commission of Missouri, said proceedings being docketed as

Case No. T-5330; admit that on December 10, 1936 the Commission issued its order in Case T-5330 and revoked the permit and authority of plaintiff to operate in interstate commerce as a freight-carrying motor carrier over the highways [fol. 17] of Missouri; admit that by subsequent order of said Public Service Commission the effective date of its order of December 10, 1936 was extended to December 30, 1936.

X

These Defendants further answering state they admit that on December 16, 1936 plaintiff filed with the Public Service Commission of Missouri an application for rehearing in said Case T-5330; that on December 23, 1936 defendant Commission issued its order overruling said application for rehearing. These Defendants specifically deny that under the decisions of the Court of Appeals and the Supreme Court of Missouri no appeal can be taken to the courts of last resort in the State from this order of the Public Service Commission.

Further answering, these Defendants deny that the action of defendant Public Service Commission in issuing its said order of December 10, 1936 was unlawful, unreasonable, arbitrary and capricious; deny that the Public Service Commission of Missouri attempted to exercise power and authority expressly delegated by the Congress of the United States to the Interstate Commerce Commission.

These Defendants further answering deny that said order of defendant Public Service Commission, issued on December 10, 1936, is or was a direct burden and interference with interstate commerce and deprives plaintiff of his right to engage in interstate commerce; deny that the public is deprived of the use of plaintiff's facilities in the transportation of property in interstate commerce.

XI

Answering the eleventh paragraph of the Bill these Defendants specifically deny that their assumption of authority was unwarranted and illegal which they asserted in issuing the order of December 10, 1936, deny that these Defendants [fol. 18] are threatening to arrest the drivers of said plaintiff's vehicles, thereby destroying the business of plaintiff; deny they have any intention or power to cause the arrest of plaintiff under the laws of the State of Missouri; deny that

they are threatening or attempting to cause the filing of informations purporting to charge plaintiff with violations of law which will work irreparable in ry and damage to plaintiff's property and cause irrep le damage to the public who are dependent on pla. for the transportation by plaintiff of their property.

Further answering, these Defendant ny that the order of these Defendants of December 10, 19 s contrary to and in violation Motor Carrier Act of 1935; deny that said order of Dece.ber 10, 1936 is in violation of Article 3 of the Constitution of Missouri; specifically deny that said order of the Public Service Commission of December 10, 1936 was or is in violation of Sections 1, 24 and 25 of Article 4 of the Constitution of Missouri; deny that plaintiff was without adequate remedy at law; deny that the acts of the Public Service Commission complained of in the Bill are illegal, without warrant and in direct interference with interstate commerce; deny that said actions invade the rights of plaintiff and deprive plaintiff of his liberty and property without due process of law in contravention of that part of Section 1 of Article 14 of the Constitution of the United States which provides as follows:

"No state shall make or enforce any laws which shall abridge the privilege or immunities of a citizen of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

Further answering, these Defendants deny that said order of defendant Commission of December 10, 1936 was and is in violation of Section 8 of Article 1 of the Constitution of the United States.

[fol. 19] XII

Further answering, these Defendants state that they deny that unless the defendants in this cause are restrained and enjoined from arresting and filing criminal charges against and prosecuting plaintiff, his drivers and employees, plaintiff will be required to defend a multiplicity of criminal actions; deny that plaintiff's property and business will be destroyed; specifically deny that plaintiff has no other adequate remedy at law.

Affirmative Defense

Further answering, these Defendants, still admitting and alleging all matters and things hereinbefore specifically admitted or alleged, state that the Public Service Commission of the State of Missouri was created and exists under and by virtue of the laws of the State of Missouri known as the Public Service Commission Law (R. S. Mo. 1929, Chap. 33, Sec. 5121, et seq.) and that under Article 8, Chap. 33, R. S. Mo. 1929, as amended by Laws of 1931, said Commission is vested with authority to supervise and regulate the operation of motor carriers in the transportation of passengers and property by motor vehicles in the State of Missouri, known as the Missouri Bus and Truck Law; that Section 1, Laws of Missouri 1933, page 359, provides:

"It is hereby declared unlawful for any person, firm, copartnership, association or corporation, to sell or offer for sale any ticket or tickets calling for transportation or contract for transportation in any manner on any motor carrier, unless the owner or operator of said motor carrier has obtained from the Public Service Commission of the State of Missouri a certificate of convenience and necessity or interstate permit authorizing such motor carrier owner or operator to render the transportation service called for by said ticket, and unless said motor carrier has been licensed and the tax paid thereon as required by Article 8, Chapter 33, Revised Statutes of Missouri, as amended by Laws of 1931, pages 304 to 316, both inclusive."

[fol. 20] II

These Defendants allege that plaintiff procured from the Public Service Commission of the State of Missouri an interstate permit No. T-3734 authorizing plaintiff to engage in interstate business only; that under the terms of Section 5268, R. S. Mo. 1929, paragraph (a): "It is hereby declared unlawful for any motor carrier to operate or furnish service as a common carrier within this state without first having obtained from the commission a certificate declaring that public convenience and necessity will be promoted by such operation." Defendants further allege that plaintiff was not the holder of a certificate of convenience and necessity authorizing him to engage in intrastate commerce.

III

These Defendants further allege that under the terms of Section 5267, R. S. Mo. 1929, paragraph (b): "The Public Service Commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined;" that under and pursuant to said section the Public Service Commission made and promulgated Rule No. 44, which rule provides:

"No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier • • • accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri."

IV

These Defendants further allege that plaintiff, in violation of Section 5268, paragraph (a), Laws of Missouri 1933, page 359, Section 1, and Rule No. 44 made and promulgated as aforesaid, did engage in intrastate business within the State of Missouri, in that plaintiff did accept for transportation and did transport property under said interstate permit from points within the State of Missouri to points within the State of Missouri.

[fol. 21]

V

These Defendants further allege that after complaints came to the Public Service Commission of the State of Missouri relating to the practices of plaintiff herein, the Commission ordered an investigation and set the matter down for hearing; that after a hearing at which plaintiff was represented by counsel and was present, the Public Service Commission of the State of Missouri issued its report and order of December 10, 1936, revoking plaintiff's permit, for the reasons set forth therein, certified copy of which is hereto attached and marked Exhibit A and by reference made part of this answer.

These Defendants further allege that on December 16, 1936 plaintiff filed a motion for rehearing and the effective date of said order revoking the permit of plaintiff was ex-

tended to December 30, 1936. These Defendants further allege that thereafter on December 23, 1936 defendant Commission issued a supplemental report and order overruling and denying plaintiff's motion for rehearing for the reasons set forth therein. Certified copy of said report and order is attached hereto, marked Exhibit B, and by reference made part of this answer.

VI

These Defendants further allege that plaintiff has a complete and adequate remedy at law, in that plaintiff is afforded a speedy, preferential and complete remedy by the laws of the State of Missouri and in this connection Defendants rely upon the following statutes:

(a) Section 5234, R. S. Mo. 1929, among other things, provides in the following language, that any party aggrieved by an order of the Public Service Commission may, as a matter of right, review said order in the circuit courts of the State of Missouri within the judicial circuit of any circuit court of any county wherein the hearing is had, which said section reads:

[fol. 22] "Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the circuit court of the county where the hearing was held or in which the commission has its principal office for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the reasonableness or lawfulness of the original order or decision or the order or decision on rehearing inquired into or determined. The applicant, at the time of applying for such writ of certiorari or review, shall deposit with the clerk of the circuit court to which such application is made the sum of twenty-five dollars, which shall be paid by said clerk to the judge of said circuit court, after a hearing had or upon the final disposition of such cause in said court. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day the cause shall be heard by the circuit court, unless for a good cause shown the same be continued. * * *

No court of this state, except the circuit courts to the extent herein specified and the supreme court on appeal, shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the executing or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties. The circuit courts of the state shall always be deemed open for the trial of suits brought to review the orders and decisions of the commission, as provided in this act and the same shall be tried and determined as suits in equity."

(b) Section 5235, R. S. Mo. 1929, among other things, provides in the following language for a stay or suspension by the circuit court of an order or decision of the Commission:

"The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of such writ, the circuit court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order or decision. No order so staying or suspending an order of the commission shall be made by any circuit court otherwise than on three days' notice and after hearing, and if the order or decision of the commission is suspended the same shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage. In case the order or decision of the commission is stayed or suspended, the order or judgment of the court shall not become effective until a suspending bond shall first have been executed and filed with, and approved by the circuit court, payable to the State of Missouri, and sufficient in amount and security to secure the prompt payment, by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission, and of all moneys which any person or corporation may be compelled to pay, pending the review proceedings, for transportation, transmission, product, commodity or service in excess of the charges fixed by the order or decision of the commission, in case such order or decision is sustained."

[fol. 23] (c) Section 5236, R. S. Mo. 1929, among other things, provides for preference in the trial in circuit court:

"All actions or proceedings under this or any other act, and all actions and proceedings commenced or prosecuted by order of the commission, and all actions and proceedings to which the commission or the state may be parties, and in which any question arises under this or any other act, or under or concerning any order or decision or action of the commission, shall be preferred over all other civil causes except election contests in all the circuit courts of the State of Missouri, and shall be heard and determined in preference to all other civil business pending therein except election contests, irrespective of position on the calendar."

(d) Section 5237, R. S. Mo. 1929, among other things, provides in the following language for the appeal to the Supreme Court, as a matter of right and preference, and for the discretionary suspension of the judgment of the circuit court pending such appeal:

"The commission, any corporation, public utility or person or any complainant may after the entry of judgment in the circuit court in any action in review, prosecute an appeal to the supreme court of this state. Such appeal shall be prosecuted as appeals from judgment of the circuit court in civil cases except as otherwise provided in this act (article). The original transcript of the record and testimony and exhibits, certified to by the commission and filed in the circuit court in any action to review an order or decision of the commission, together with a transcript of the proceedings in the circuit court, shall constitute the record on appeal to the supreme court. Where an appeal is taken to the supreme court the cause shall, on the return of the papers to the supreme court, be immediately placed on the docket of the then pending term by the clerk of said court and shall be assigned and brought to a hearing in the same manner as other causes on the then pending term docket, but shall have precedence over all civil causes of a different nature pending in said court. No appeal shall be effective when taken by a corporation, person or public utility unless a cost bond of appeal in the sum of five hundred dollars shall be filed within ten days after the entry of judgment in the circuit court appealed from. The circuit court may in its discretion suspend its judgment pending the hearing

in the supreme court on appeal, upon the filing of a bond by such corporation, person or public utility with good and sufficient security conditioned as provided for bonds upon actions for review and by further complying with all terms and conditions of this act (law) for the suspension of any order or decision of the commission pending the hearing of review in the circuit court."

These Defendants allege that in view of the above statutory provisions of the State of Missouri providing for speedy, adequate and complete and even preferential remedy, this Court on principles of comity should not entertain this suit for injunctive relief.

[fol. 24] Wherefore, these Defendants pray that the temporary restraining order be set aside, that the Bill be dismissed and that the prayer for relief be denied and for all other further and general orders and decrees that may be found proper in the premises.

Public Service Commission of Missouri, by James P. Boyd, General Counsel; Daniel C. Rogers, Assistant Counsel, Solicitors.

[fol. 25] EXHIBIT "A" TO ANSWER

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Case No. T-5330

Proceeding to Revoke the Authority of Frank Eichholz, Doing Business as Riteway Motor Service, Holder of Interstate Permit No. T-3734 and a Citation to Said Frank Eichholz to Show Cause if Any He Has Why His Permit to Operate Interstate as a Motor Carrier of Freight Should Not be Revoked

Report and Order

This proceeding was instituted by an order of the Commission directing that a hearing be held and an investigation made concerning the nature and conduct of the business of Frank Eichholz as a motor carrier, and to determine particularly whether or not he has engaged unlawfully in intrastate commerce and in what manner he has vio-

lated the law or the rules and regulations of the Commission applicable to his business, and whether or not his present permit as an interstate motor carrier of freight should be revoked.

Pursuant to that order and upon notice duly served a hearing was conducted before a member of the Commission at its office in Jefferson City, Missouri, August 17 and 18, 1936, at which time and place respondent appeared in person and by counsel and appearances were also entered on behalf of other motor and rail carriers by the Hon. John D. Taylor, Hon. Nick Cave, Hon. M. E. Casey, Mr. George Aylward, Mr. J. R. Rose, Mr. Joe H. Miller and Mr. R. W. Hedrick.

The evidence consists of the oral testimony of eighteen witnesses, numerous exhibits comprising bills of lading, freight bills, orders for merchandise, tariff schedule, and other documentary evidence together with admissions and agreed statements of fact.

[fol. 26] By uncontradicted proof and by admissions it was shown that respondent is the holder of an interstate Permit No. T-3734 issued by this Commission authorizing him to operate as a motor carrier of freight in interstate commerce exclusively; that he has no authority to operate as an intrastate carrier; that he receives and transports freight from shippers in St. Louis, Missouri, destined to consignees in Kansas City, Missouri, and receives and transports freight from shippers in Kansas City, Missouri, destined to consignees in St. Louis, Missouri; that in transporting such freight it is moved through a terminal located across the state line in Kansas City, Kansas, known as the Mid-Central Terminal; and he assumes full responsibility for the entire transportation from consignor to consignee. In receiving goods at St. Louis, Missouri, destined for Kansas City, Missouri, it is sometimes picked up at the shippers dock by the carrier's own vehicles and sometimes it is transported to the St. Louis terminal by other pick-up carriers who move it at the cost of the carrier. Such shipments are then carried over U. S. Highway No. 40 to Kansas City, Missouri, through Kansas City, Missouri, to the carrier's terminal in Kansas City, Kansas, located at Shawnee and Adams Streets where it is unloaded, and thence conveyed back to Kansas City, Missouri, to the consignee through arrangement existing between Eichholz and the terminal operator. The terminal operator procures trucks

for such delivery at the cost of Eichholz. Shipments received at Kansas City, Missouri, destined to consignees at St. Louis, Missouri, are collected in behalf of Eichholz by the terminal operator in Kansas City, Kansas, or in some instances shippers in Kansas City, Missouri, make their own delivery to the terminal in Kansas City, Kansas, and receive therefor a reduction of 5¢ per hundred weight below the quoted tariff. The Mid-Central Terminal is owned and operated by R. H. Straight, who has no authority to trans- [fol. 27] port goods by motor cars into the State of Missouri. It is agreed that the respondent has filed an application with the Interstate Commerce Commission for a certificate under the grandfather clause as provided in the Federal Motor Carrier Act, 1935. A copy of this application was offered in evidence. Eichholz has filed with the Interstate Commerce Commis on a motor freight tariff designated M. F.-1 C. C. No. in which a rate is quoted from St. Louis, Missouri, to Kansas City, Missouri. His chief office and place of business is at 513 South Second Street, St. Louis, Missouri. He does not maintain any office, depot or terminal in Kansas City, Missouri, and has never done so but in his operation he has always utilized the Mid-Central Terminal in Kansas City, Kansas. The present relationship between the Mid-Central Terminal and Frank Eichholz in the use of the terminal at Shawnee and Adams Streets, Kansas, has existed for approximately three years.

The testimony is voluminous and to a large extent cumulative. It shows an industrious solicitation on behalf of Eichholz for the transportation of freight from Kansas City, Missouri, to St. Louis, Missouri, and from St. Louis, Missouri, to Kansas City, Missouri, on the basis of his quoted interstate rate between such cities as exemplified in his tariff filed with the Interstate Commerce Commission. This rate is much lower than the established rate for intrastate carriers operating between such cities. By such means a large volume of business was developed, some shippers making daily deliveries to this carrier. They were induced to use his service mainly by the lower freight rate available. Some of such shippers were informed and knew that their shipments were to pass through the Kansas Terminal in transit; others did not know it and were not aware of the course of the traffic, and never heard of the Mid-Central Terminal in Kansas having anything to do with the transportation.

[fol. 28] It is deemed unnecessary and impracticable to set out all of the testimony of the various witnesses. Reference will be made to specific witnesses whose testimony may be regarded as typical of the testimony of others and with special reference to the bearing which it may have upon the question of the character of commerce in which respondent has engaged.

The deposition of R. H. Straight, owner and operator of the Mid-Central Terminal at Kansas City, Kansas, was obtained and received in evidence. His testimony covers the relationship existing between him and Frank Eichholz operating under the name of the Riteway Motor Service and describes the service which he renders to Eichholz in connection with the transportation of property between Kansas City, Missouri, and St. Louis, Missouri, and other operations conducted by Eichholz as a motor carrier. He was asked to describe how freight was handled which originated in Kansas City, Missouri, destined to consignees in St. Louis, Missouri. He said that shippers in Kansas City, Missouri, would call the Mid-Central Terminal Company for a pick up of merchandise and the pick-up drivers of the Mid-Central Terminal would make the pick up; that the bill of lading was made out to the Mid-Central Terminal, Kansas City, Kansas, sometimes marked in care of the Riteway and sometimes not; that the shipment was brought to the terminal and then rebilled "showing the Mid-Central Terminal of Kansas City, Kansas, as shipper consigned to the consignee in St. Louis, Missouri." He considered the merchandise in his care until turned over to the Riteway. He employed the pick-up drivers. Such bill of lading shows, at the time it is signed by the pick-up driver, that the shipment is destined to St. Louis, Missouri. Quantity or truck load shipments are handled in the same manner as l. c. l. shipments. The trucks of the Riteway do not go into Kansas City, Missouri, to pick up a full truck load of merchandise destined for St. Louis and take it through the terminal for rebilling. Eichholz has been operating the Riteway Mo-[fol. 29] tor Service in and out of this terminal for about five years and during that time shipments between Kansas City, Missouri, and St. Louis, Missouri, have been handled in practically the same manner, but there was some change in the Spring of 1936 in several matters of office routine and detail; that he made collection of all freight that goes

through the terminal from St. Louis to Kansas City and in estimating the amount use is made of the Riteway tariff. The Riteway pays the terminal operator for all terminal service and all other service rendered in connection with the pick up and delivery of shipments carried by the Riteway. No collection for his service is made from any consignee or shipper whose freight is handled by Eichholz but he receives all his compensation from Eichholz. Prior to April 1936 there was a different arrangement and something in addition to the freight rate between St. Louis, Missouri, and Kansas City, Missouri, was collected from consignees. Service rendered in connection with shipments from St. Louis to Kansas City, Missouri, are paid for in the same manner. Witness stated that on shipments from St. Louis, Missouri, to Kansas City, Missouri, that he received a communication from shippers on every shipment generally consisting of bills of lading directing him what disposition to make of the property; that such bills of lading covered the movement of the merchandise from Kansas City, Kansas, to Kansas City, Missouri, and when these bills of lading are signed by the consignee showing receipt of the goods that they are returned to the shipper in St. Louis. As a rule such bills are mailed except in unusual circumstances. When speedy delivery is necessary the bill of lading will be sent along with the Riteway truck in a sealed envelope. The Riteway brings considerable freight to the terminal which is destined to points other than Kansas City, Missouri. He receives no bill of lading for forwarding freight destined to points in states other than Missouri. He was asked what he did with the freight bills on shipments originating in [fol. 30] St. Louis, Missouri, destined to consignees in Kansas City, Missouri. He said "I think I can answer that best by saying as putting ourselves in the position of a consignee as far as the Riteway Motor Service goes. We signed one bill as received and keep one copy here, the consignees copy for our files." The name of the consignee in Kansas City, Missouri, appears on the freight bills in some instances. They are designated in care of the Mid-Central Terminal Kansas City, Kansas. In other instances there is no name of a consignee in Kansas City, Missouri, given and reliance is placed upon the bills of lading which are mailed to the Mid-Central Terminal from St. Louis for billing instructions between the terminal and the consignee in Kansas

City, Missouri. The freight rate on billings issued by the terminal are the same as that shown on the original Riteway billing from St. Louis, Missouri, to Kansas City, Kansas, and this is the same as the interstate freight rate charged by the Riteway between St. Louis, Missouri, and Kansas City, Missouri, via the terminal in Kansas City, Kansas. Practically all shipments originating in Kansas City, Missouri, destined to St. Louis, Missouri, moving through the Kansas terminal are brought there through the solicitation of agents for Eichholz. A Mr. Barrett solicits in Kansas City, Missouri, and a Mr. Miller in St. Louis, Missouri, for the movement of freight by Eichholz between the two points through the Kansas terminal. Witness claimed that he did not know that the interstate rate afforded by Eichholz was lower than the established intrastate rate. He was questioned in reference to numerous movements of freight from St. Louis, Missouri, destined to consignees in Kansas City, Missouri, and North Kansas City, Missouri, and how they were handled through the Kansas terminal. Such shipments were received at the terminal and according to the witness in every instance rebilled from the terminal to the consignee in Missouri and the property delivered by the employees of the terminal company and the terminal company received its compensation for all terminal service and delivery service from Eichholz.

[fol. 31] Mr. Baumgartner of St. Louis, Missouri, testified that he is the traffic manager for the H & K Coffee & Spice Company. He produced bills of lading and other documents from the files of the Company having reference to transactions with the Riteway Motor Service. His evidence discloses that the company upon request for merchandise by its representative at Kansas City, Missouri, routed various shipments and issued its bills of lading for the transportation of goods via Riteway from St. Louis, Missouri, to its agent A. Baill in Kansas City, Missouri; that the goods were carried by Eichholz through the terminal in Kansas City, Kansas, and delivered to the consignee in Kansas City, Missouri. The goods were picked up by Eichholz in St. Louis and he was informed by the agent of the Riteway that the property would move through the Kansas City, Kansas Terminal. The Riteway made the pick up in St. Louis; that frequent shipments were made that way and that the lower rate for transportation was the reason for delivering the property to Eichholz for transportation and that he does

practically all of such hauling for the company; that no bill of lading was mailed to the Mid-Central Terminal in Kansas, and that there was no communication whatever with the terminal; that disposition was always made according to the bills of lading. The bill of lading shows Kansas City, Missouri, as the destination. The freight bills shows the destination to be in care of the Mid-Central Terminal, Kansas City, Kansas, but does not show the destination of the shipments. There is no rebilling of the goods at Kansas City, Kansas, so far as witness knew. The shipments are billed to Kansas City, Missouri. All packages of such shipments were marked "A. Baill, % H. & K. Warehouse, Kansas City, Missouri." When the property was delivered for transportation the agent of Eichholz placed a rubber stamp on the bill of lading containing the following words: "Riteway Motor Service via Kansas City, [fol. 32] Kansas" and the pick-up agent or employee would sign his name or initials under such stamp as the receipt for the goods. Such shipments have been made for a period of probably six months. The agent of the Riteway pointed out and emphasized the cheaper freight service afforded by this carrier by moving freight in the manner described. He had not noticed the wording of the rubber stamp on the bill of lading until called to this attention by an agent of the Bus and Truck department and stated that he did not care whether it was on there or not, and that all he cared for was getting a receipt for the shipment.

Mr. Schmidt of St. Louis, Missouri, testified that he is traffic manager and shipping clerk for the Alligator Oil Clothing Company; that he handles bills of lading and gives shipping instructions for the company. He presented certain exhibits showing consignment of goods from his company in St. Louis to Wolff Bros. Inc., Kansas City, Missouri, for transportation by the Riteway Motor Service. He did not know that such shipment was to go through Kansas City, Kansas. There was no contact with the Kansas City, Kansas, Terminal. The bill of lading called for transportation to Kansas City, Missouri. Witness had never seen the Riteway rubber stamp. There had been solicitation for business. He did not know how the shipments reached the consignee in Kansas City, Missouri, and at the time he was testifying was the first that he had learned that the shipment was carried through Kansas City, Kansas. The packages were stencilled "Wolff Bros. Kansas City, Missouri."

Miss H. Frank, an employee of the Perfection Manufacturing Company of St. Louis testified to shipments made by that company to the Western Auto Supply Company, Kansas City, Missouri. The shipment was routed on customer's order over the Riteway. Witness did not know that the shipment was to move through Kansas City, Kansas. [fol. 33] A copy of the bill of lading was sent to the customer and there was no contact with the Mid-Central Terminal in Kansas City, Kansas. Other witnesses testified to a similar state of facts.

Mrs. Turpin, Assistant Secretary of the Neevel Manufacturing Company of Kansas City, Missouri, testified that her company made 35 or 40 shipments per month from Kansas City, Missouri, to consignees in St. Louis, Missouri, and to other places in the State. Documents were presented showing bills of lading for goods consigned to S. S. Kresge Company, St. Louis, Missouri, and to Graver's Department Stores at Cardwell and Sikeston, Missouri, and to the Brown Shoe Company, St. Louis, Missouri. According to these bills of lading the shipments were routed in these words: "Route Mid-Central Terminal via Riteway", and the shipments to Graver's Department Stores were routed "Riteway to St. Louis % F & F Truck Company, 631 South Broadway, St. Louis, Missouri." Witness testified that the shipments were routed to "our best advantage"; that the designation was "Mid-Central Terminal via Riteway". The Mid-Central made the pick up. Mr. Barrett had solicited for the Riteway and showed witness how money could be saved by shipping through the Riteway. The intrastate rates were much higher than the interstate rate quoted by Eichholz. Connection with the Company began four or five months ago. The cartons containing the merchandise were marked with the name of the consignee at St. Louis, Missouri. The plant of this company is located on the east side of Kansas City, Missouri, and 10 or 12 miles from the terminal in Kansas City, Kansas.

Miss Irene Schmitz testified that she is the traffic manager for the Pen-Jel Corporation of Kansas City, Missouri; that upon solicitation by the agent of the Riteway shipments were made from Kansas City, Missouri, to the company's broker in St. Louis, Missouri, and she was informed that the Mid-Central Terminal would pick up the shipments for Eichholz.

[fol. 34] Mr. L. L. Morgan testified that he was in charge of traffic for the Puritan Compressed Gas Corporation with plant located in North Kansas City, Missouri; that he had been solicited by Barrett and the Mid-Central for shipments over the Riteway and he designated various shipments which were made back and forth from St. Louis, Missouri, to North Kansas City through Eichholz's service. He was informed to call the Mid-Central Terminal for pick-up service. The routing was designated as "Mid-Central Terminal via Riteway". The labels on the packages were "Puritan Compressed Gas Corporation" with the St. Louis address. The shipments were between the company and its agent or branch office in St. Louis. He had been shown the tariff of the Riteway Company filed with the Interstate Commerce Commission and the rates paid for the shipments made were those specified in that tariff.

Mr. Denebein was in charge of shipments for the Waxide Paper Company of St. Louis and made shipments nearly every day over the Riteway. The receipt on the bills of lading read "Riteway Motor Service via Kansas City, Kansas, Les H". Witness did not know that this stamp was on the bills of lading or the wording of it until it was called to his attention, although he knew that the shipments from St. Louis, Missouri, to Kansas City, Missouri, went through Kansas City, Kansas. All packages were stencilled with the consignee's name and address. Formerly the practice had been to issue two sets of bills of lading, one evidencing a contract of transportation from St. Louis to Kansas City, Kansas, and another from the Mid-Central Terminal to Kansas City, Missouri. This was done with a view of conformity to an interstate transaction. This practice, however, was discontinued upon information received by telephone that it was no longer necessary. This witness also testified that there had never been any contact whatsoever with the Mid-Central Terminal in Kansas City, Kansas, with reference to these shipments.

[fol. 35] Mr. Baisile in charge of the Traffic Department of the American Beauty Macaroni Company of Kansas City, Missouri, testified to shipments by that company to its own plant in St. Louis, Missouri, using the Riteway service. He testified that the company transported its own goods from Kansas City, Missouri, to the Mid-Central Terminal in Kansas City, Kansas, and was allowed 5¢ per hun-

dred on its freight bill. The company had been solicited for such movement of freight by Barrett. Witness also testified that his company in making a shipment from Kansas City, Missouri, to Wichita, Kansas, did not haul such shipments from its plant to the Mid-Central Terminal "because it is an interstate shipment. We don't have to do it."

Mr. Mueller in charge of Traffic for the Federated Metals Corporation of St. Louis, Missouri, testified to the movement of property for that company by the Riteway Service to the Western Newspaper Union at Kansas City, Missouri, and to other shipments between said cities; that such shipments have been made since the first of April and since the filing of the Eichholz tariff with the Interstate Commerce Commission. The tariff had been submitted to him and inquiry was made of the method of handling shipments under said interstate rates. It was explained to the witness that the property would be loaded on trucks in St. Louis and handled through the Mid-Central Terminal in Kansas City, Kansas, and then delivered to a truck line or local drayage concern and delivered back from Kansas City, Kansas, to consignees in Kansas City, Missouri. The witness was doubtful about the propriety of such operation but was eventually instructed by his superiors to use the service. The tariff rate was lower than other rates. There was no contact made by witness or his company with the Mid-Central Terminal and no instructions were issued to it. The packages in such shipments were marked from the company to its consignee in Kansas City, Missouri. The intrastate rates were too high to meet competition from East St. Louis.

[fol. 36] Many other witnesses testified in a similar manner and Mr. Eichholz was eventually called by counsel for the Commission and stated that he assumed responsibility for delivery between St. Louis, Mo., and Kansas City, Mo. and that he paid Mr. Straight of the Mid-Central Terminal for all service rendered by him.

Over objection of counsel for respondent there was offered and received in evidence General Order No. 27 of the Public Service Commission as amended. It included Rule Numbered 44 which was admitted in evidence.

At the conclusion of evidence offered in behalf of the Commission counsel for respondent stated that he would

rest the case on the facts before the Commission and no further evidence was offered or received on behalf of respondent.

From the declared objects of the investigation briefs of counsel and the evidence it is apparent that the controlling question for determination is the character of commerce in which respondent engaged while transporting property as a motor carrier for hire from consignors in Kansas City, Missouri, to consignees in St. Louis, Missouri, and other Missouri points, and from consignors in St. Louis, Missouri, to consignees in Kansas City, Missouri. This question must be determined by a consideration of all relevant facts and upon such consideration we are of the opinion and find from the evidence that such commerce was intrastate in character; that respondent has solicited and engaged in such business under the pretense of transacting interstate business; that he has resorted to shams, devices and subterfuges which merely give the color of interstate commerce to his transactions; that he has unlawfully sought thereby to exercise valuable rights and privileges never acquired and to evade regulation by the State of Missouri. For these findings and conclusions we rely upon the admitted facts, the uncontradicted evidence above recited and the law applicable to the case.

[fol. 37] With the exception of the testimony of the Kansas terminal operator there is no conflict in the evidence. His testimony to the effect that there were two separate and distinct movements in the transportation of property from St. Louis, Missouri, first to Kansas City, Kansas, on a separate bill of lading, and another shipment on another bill of lading, and under instructions from the shipper, from Kansas City, Kansas, to the consignee in Kansas City, Missouri, is completely overthrown by the documentary evidence and by the testimony of numerous witnesses. We accord no weight to his evidence on this subject and give it no credence whatever other than to draw the justifiable inferences that he was aware of and a willing participant in the scheme of Eichholz to camouflage the true character of the business in which Eichholz was engaged. The bills of lading in evidence show contracts of through shipment from consignors to consignees all in the State of Missouri. The entire transportation was conducted by Eichholz and responsibility therefor is clearly shown and admitted. Eich-

holz is authorized to operate as a freight-carrying motor carrier from all points in Missouri to points beyond the State and from points beyond Missouri to all points within the State in interstate commerce exclusively, and such operation is authorized over an irregular route. The use of the state highways is at his disposal for the conduct of legitimate business. There is direct connection by improved highways between St. Louis and Kansas City, Missouri, and in order to reach Kansas City, Kansas, the highways over which one would travel and the ones actually used by Eichholz pass through Kansas City, Missouri. Property conveyed by Eichholz from St. Louis, Missouri, was transported many miles beyond the location of consignees in Kansas City, Missouri, and in North Kansas City, Mo., in order to reach the Kansas terminal and thence reconveyed many miles to the consignees location in Missouri. In one instance at least the consignee was located on the east side [fol. 38] of Kansas City ten or twelve miles from the terminal in Kansas, and we know as a matter of common knowledge that such a method of transportation is wholly unnecessary, uneconomical and a plain diversion from the normal path of transportation from consignor to consignee. A motor carrier cannot voluntarily convert intrastate commerce into interstate commerce merely by crossing a state line when it would be contrary to convenience, necessity and advantage to do so. When Eichholz indulged in such practices he was seeking and obtained an unlawful advantage over intrastate operators and caused an unnecessary diversion of shipments carried by him so that they would cross a state line in transit to the consignees. Such a practice is a plain subterfuge and a fraud. Facts overturn fiction.

Respondent is authorized to engage in interstate commerce exclusively and has no authority to operate intrastate as a motor carrier and when he did so engage his operation was in violation of the Missouri Bus and Truck Law Section 5268 R. S. Mo. 1929 and Rule No. 44 of this Commission which prohibits a motor carrier operating under an interstate permit to accept for transportation within this state any property known to be destined to a point within the state.

Counsel for respondent strenuously contends that the business so conducted by Eichholz was regular, legitimate, and in all respects interstate commerce over which this

Commission has no jurisdiction; that since the passage of the Federal Motor Carrier Act of 1935 interstate carriers are under the exclusive jurisdiction of the Interstate Commerce Commission. It is admitted that the regulation of intrastate commerce is left to the State Commissions but it is insisted that Congress has defined the term interstate commerce to mean "commerce between any place in a state and any place in another state or between places in the same state through another state whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water." In the argument reli- [fol. 39] ance is placed upon this definition to characterize the business of Eichholz as interstate commerce, and it is insisted that the motive or reason for his operations across a state line through another state in the transportation of property from consignors to consignees within the state of Missouri is wholly immaterial and does not in any manner affect the character of the commerce in which the carrier was engaged, but the true character of the commerce is to be determined by the route and the fact that it did cross a state line. We think counsel is in error and we do not agree to any such interpretation of the Act of Congress or the effect upon the character of commerce when it is intentionally caused to be diverted over an unreasonable and unnecessary route in order to cross a state line and thereby acquire the false color of interstate commerce. Congress never intended to permit or assist the perpetration of a fraud or abridge the right of a state to prevent fraud against it, and in defining interstate commerce as that between places in the same state through another state the Congress evidently had in mind a normally established interstate route and connecting routes reasonably called for by convenience, necessity and benefit. Fictitious routes and false motives are equally immaterial and ineffective in the presence of facts showing things actually done by a carrier according to the known intention of a shipper. Such facts determine the character of commerce involved.

Reliance is also placed upon telegraph and railroad cases in which it was held that messages or property moving from one place in a state to another place in the same state but over a line through another state was interstate commerce. Railroads and telegraph companies transact their business over constructed and permanently established reg-

ular routes and we do not deem the pronouncements in such cases applicable to the business of a motor carrier operating over irregular routes and in the manner that respondent has conducted his business.

[fol. 40] With equal force reliance is placed upon respondent's quoted tariff as a shield. The tariff filed with the Interstate Commerce Commission quotes a rate on various classes of goods between St. Louis, Missouri, and Kansas City, Kansas, and quotes the same rates between St. Louis and Kansas City, Missouri, with the words "interstate only" in parenthesis. This cannot be a shield of protection or any justification for respondent to engage in commerce which is in fact intrastate. It is more properly a badge of fraud when considered in connection with the manner in which respondent used it to solicit freight moving between the two cities in Missouri. It would be as logical, reasonable and practicable for him to quote a rate and carry freight over Missouri highways from St. Louis to St. Joseph via Elwood, Kansas, or to Palmyra via Quincy, Illinois, or Cape Girardeau via East End of the Bridge. If he were to do so no one would doubt the intrastate character of the business. Every shield that is interposed between fraud and right is transparent to the eye of justice. Due regard for the interests of legitimate carriers whose rights have been invaded, and the public concern in the maintenance of regulated traffic demand that the respondent's violations cease.

In our finding and conclusions from the evidence that respondent has unlawfully engaged in intrastate commerce, that his transportation of intrastate shipments across a state line was a subterfuge and a fraud, that the facts determine the true character of the business in which he was engaged, we are supported by numerous decisions and pronouncements of Courts and Commissions. Sprout vs. South Bend 277 U. S. 163, 168. Clark vs. Poor 274 U. S. 552. Interstate Busses Corp. vs. Holyoke Street Railway Co. 273 U. S. 45, 51. Blackmore vs. P. S. C. 183 Atl. 115. Inter-City Coach Co. vs. Atwood, 21 Fed. (2d) 83, 85. Detroit-Cincinnati Coach Lines vs. P. U. C. of Ohio, 119 Ohio State 324. Daniels Motor Stages vs. P. S. C. In Equity No. 608 and Midland Stages vs. P. S. C. In Equity No. 610 determined by a three-judge Federal Court in the Central Division of the Western District of Missouri, June 13, 1934.

[fol. 41] The violations of respondent are flagrant. The evidence shows that he is actively acquisitive and yields easily to temptation; that he has intentionally exceeded his authority; that he has violated the law and the rules of the Commission; and that he is guilty of a misdemeanor and subject to a fine or imprisonment under the applicable penal statute. Section 5275 Laws of Mo. 1931, Page 314.

A withdrawal of authority heretofore granted respondent appears to be fully justified and the Commission finds that his existing permit should be revoked.

Wherefore, after due consideration, it is,

Ordered: 1. That Permit No. T-3734 heretofore issued by this Commission under date of November 23, 1934, to Frank Eichholz doing business as Riteway Motor Service and authorizing him to operate interstate as a freight-carrying motor carrier over an irregular route be and the same is hereby recalled, revoked, set aside and for naught held.

Ordered: 2. That Frank Eichholz, doing business as Riteway Motor Service shall after the effective date of this order cease and desist from operation as a motor carrier of freight over the highways of the State of Missouri while engaged in intrastate commerce, and shall cease and desist from the exercise of any right or privilege heretofore granted to him under the permit which is by Ordered: 1 revoked.

Ordered: 3. That this order shall be in effect ten days from the date thereof and that the Secretary of the Commission shall forthwith serve certified copies of this report and order upon all interested parties as the law provides.

By the Commission.

Robert E. Holliway, Secretary. (Seal.)

Hargus, Chr., Anderson, Boyer, Nortoni and Ferguson, CC. Concur.

Dated at Jefferson City, Missouri, this 10th day of December, 1936.

[fol. 42] In United States District Court

Separate Answer of Roy McKittrick—Filed January 22, 1937

Comes now Roy McKittrick, Attorney-General of the State of Missouri, defendant herein, and for his separate answer to plaintiff's bill states:

I

This defendant admits the allegations contained in the first paragraph of the Bill.

II

Admits that this suit is an action of a civil nature; denies the dispute herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00); denies it is a controversy between citizens of the same state seeking to test the constitutionality of an order of the Public Service Commission of Missouri which interferes with interstate commerce, and denies that this question arises under the Constitution and laws of the United States, as alleged in paragraph II of the Bill.

[fol. 43] III

This defendant admits the allegations contained in the third paragraph of the Bill.

IV

This defendant denies that since November 23, 1934 plaintiff has been continuously engaged in the transportation for hire of personal property as a common carrier in interstate commerce, as alleged in paragraph IV of the Bill.

V

This defendant answering the fifth paragraph of the Bill specifically denies plaintiff operates a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas.

Further answering, this defendant says he has no information sufficient to form a belief as to the allegation contained in the fifth paragraph of the Bill as to the plaintiff operating a terminal building located at 511 South Second Street, St. Louis, Missouri, a terminal building located at 309 North Rock Island Avenue, Wichita, Kansas, a terminal building located at 115 Eleventh Street, Des Moines, Iowa, and a terminal building located at 611 South Main Street, Burlington, Iowa, and therefore denies that plaintiff operates said terminal buildings.

Further answering, this defendant states he has no information sufficient to form a belief as to the number of pieces

of motor equipment plaintiff has in rendering service in the transportation of property for hire nor the number of pieces of motor equipment plaintiff has leased for said purpose and therefore denies plaintiff owns and operates thirty-seven (37) pieces of motor equipment in rendering service in the transportation of property in interstate commerce, and has leased thirty-two pieces (32) of motor equipment which he also operates in rendering service in the transportation of property between the States of Illinois, Missouri, Kansas, and Iowa.

[fol. 44] VI.

This defendant answering the sixth paragraph of the Bill says he has no information sufficient to form a belief as to the allegations therein contained and therefore denies plaintiff has invested large sums of money in motor vehicles, trucks, tractors and semi-trailers, and in terminal facilities; that he has established regular and convenient routes of travel for said motor vehicles between the terminals alleged in the Bill; that he maintains at said terminals agents and employees for receiving, checking, billing, and forwarding property for transportation; that he maintains proper and sufficient motor equipment, commonly known as road trucks, for the transportation of property between terminals, and provides and maintains at said terminals motor vehicles for rendering pick-up and delivery service between his terminals and consignors and consignees, as set out in the sixth paragraph of the Bill; specifically denies that he maintains said motor vehicles, both highway and terminal motor vehicles, as set out in plaintiff's tariff now on file with the Interstate Commerce Commission, as alleged in the sixth paragraph of the Bill.

VII

This defendant further answering states he has no information sufficient to form a belief as to the allegations contained in the seventh paragraph of the Bill and therefore denies that plaintiff assembles at his terminals large numbers of shipments through the use of his pick-up equipment, which shipments are then loaded into the motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which the shipments are destined, and are there transferred to the dock and reloaded into the various delivery trucks to be delivered to the various

consignees in the commercial areas, as alleged in plaintiff's Bill. Specifically avers the fact to be that this defendant that plaintiff operates in the prosecution of his business a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas, as alleged in the fifth paragraph and [fol. 45] referred to in the seventh paragraph of the Bill, but avers the fact to be that plaintiff does not operate a terminal building at Shawnee and Adams Streets, Kansas City, Kansas and does not own and operate pick-up equipment at said terminal *at said terminal* through which he assembles large numbers of shipments, which shipments are then loaded into motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which said shipments are destined, as alleged in the seventh paragraph and referred to in the fifth paragraph of the Bill.

VIII

This defendant further answering states he admits the Seventy-Fourth Congress of the United States passed an Act, approved August 9, 1935, known as "Motor Carrier Act, 1935." Admits that by said Act the Interstate Commerce Commission was given exclusive jurisdiction to grant certificates of convenience and necessity to common carriers by motor vehicles in interstate commerce, to regulate rates and service of said carriers in interstate commerce. Further answering, this defendant says he has no information upon which to form a belief as to whether plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form BMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959, and has filed with the Interstate Commerce Commission a schedule of rates for said transportation, and, therefore, denies that plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form DMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959; denies that plaintiff filed with the Interstate Commerce Commission a schedule of rates for interstate transportation, and specifically denies that plaintiff has complied with all requirements of said Motor Carrier Act of 1935 and the orders of the Interstate Commerce Commission, as alleged in the eighth paragraph of the Bill.

[fol. 46]

IX

Answering the allegations in the ninth paragraph of the Bill, this defendant admits that on November 23, 1934 the Public Service Commission of Missouri issued to plaintiff an Interstate Permit No. T-3734; admits that plaintiff filed with the Public Service Commission insurance policies and paid license fees and taxes, as required by the Public Service Commission Law of Missouri, for the transportation of property for hire over the highways of the State of Missouri for interstate movements and in interstate commerce only. Further answering, this defendant specifically denies that plaintiff has fully complied in all respects with the laws of the State of Missouri and the orders of the Public Service Commission of Missouri.

Further answering, this defendant admits that on July 22, 1936 the Public Service Commission instituted a proceeding to revoke the authority of Frank Eichholz, doing business as Riteway Motor Service, and holder of Interstate Permit No. T-3734 theretofore issued by the Public Service Commission of Missouri, said proceedings being docketed as Case No. T-5330; admits that on December 10, 1936 the Commission issued its order in Case T-5330 and revoked the permit and authority of plaintiff to operate in interstate commerce as a freight-carrying motor carrier over the highways of Missouri; admits that by subsequent order of said Public Service Commission the effective date of its order of December 10, 1936 was extended to December 30, 1936.

X

This defendant further answering states he admits that on December 16, 1936 plaintiff filed with the Public Service Commission of Missouri an application for rehearing in said Case T-5330; that on December 23, 1936 defendant Commission issued its order overruling said application for rehearing. This defendant specifically denies that under the [fol. 47] decisions of the Court of Appeals and the Supreme Court of Missouri no appeal can be taken to the courts of last resort in the State from this order of the Public Service Commission.

Further answering, this defendant denies that the action of defendant Public Service Commission in issuing its said order of December 10, 1936 was unlawful, unreasonable, arbitrary and capricious; denies that the Public Service

Commission of Missouri attempted to exercise power and authority expressly delegated by the Congress of the United States to the Interstate Commerce Commission.

This defendant further answering denies that said order of defendant Public Service Commission, issued on December 10, 1936, is or was a direct burden and interference with interstate commerce and deprives plaintiff of his right to engage in interstate commerce; denies that the public is deprived of the use of plaintiff's facilities in the transportation of property in interstate commerce.

XI

Answering the eleventh paragraph of the Bill this defendant denies that this defendant is threatening to arrest the drivers of said plaintiff's vehicles, thereby destroying the business of plaintiff; denies he has any intention to cause the arrest of plaintiff under the laws of the State of Missouri; denies that he is threatening or attempting to cause the filing of informations purporting to charge plaintiff with violations of law which will work irreparable damage to the public who are dependent on plaintiff for the transportation by plaintiff of their property.

Further answering, this defendant denies that the order of these Defendants of December 10, 1936 is contrary to and in violation of the Motor Carrier Act of 1935; denies that said order of December 10, 1936 is in violation of Article 3 of the Constitution of Missouri; specifically denies [fol. 48] that said order of the Public Service Commission of December 10, 1936 was or is in violation of Sections 1, 24 and 25 of Article 4 of the Constitution of Missouri; denies that plaintiff was without adequate remedy at law; denies that the acts of the Public Service Commission complained of in the Bill are illegal, without warrant and in direct interference with interstate commerce; denies that said actions invade the rights of plaintiff and deprive plaintiff of his liberty and property without due process of law in contravention of that part of Section 1 of Article 14 of the Constitution of the United States which provides as follows:

"No state shall make or enforce any laws which shall abridge the privilege or immunities of a citizen of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, or deny to any

person within its jurisdiction the equal protection of the laws."

Further answering, this defendant denies that said order of defendant Commission of December 10, 1936 was and is in violation of Section 8 of Article 1 of the Constitution of the United States.

XII

Further answering, this defendant states that he denies that unless the defendant in this cause is restrained and enjoined from arresting and filing criminal charges against and prosecuting plaintiff, his drivers and employees, plaintiff will be required to defend a multiplicity of criminal actions; denies that plaintiff's property and business will be destroyed; specifically denies that plaintiff has no other adequate remedy at law.

Roy McKittrick, Attorney-General of the State of Missouri, Defendant, by Covell R. Hewitt, Assistant Attorney-General.

[fol. 49] *Duly sworn to by Covell R. Hewitt. Jurat omitted in printing.*

[fol. 50] In United States District Court

Separate Answer of B. M. Casteel—Filed January 22, 1937

Comes now B. M. Casteel, Superintendent of Missouri State Highway Patrol, defendant herein, and for his separate answer to plaintiff's Bill states:

I

This defendant admits the allegations contained in the first paragraph of the Bill.

II

Admits that this suit is an action of a civil nature; denies the dispute herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00); denies it is a controversy between citizens of the same state seeking to test the constitutionality of an order of the Public Service Commission of Missouri which interferes

with interstate commerce, and denies that this question arises under the Constitution and laws of the United States, as alleged in paragraph II of the Bill.

III

This defendant admits the allegations contained in the third paragraph of the Bill.

IV

This defendant denies that since November 23, 1934, plaintiff has been continuously engaged in the transportation for hire of personal property as a common carrier in interstate commerce, as alleged in paragraph IV of the Bill.

[fol. 51] V

This defendant answering the fifth paragraph of the Bill specifically denies plaintiff operates a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas.

Further answering, this defendant says he has no information sufficient to form a belief as to the allegation contained in the fifth paragraph of the Bill as to the plaintiff operating a terminal building located at 511 South Second Street, St. Louis, Missouri, a terminal building located at 309 North Rock Island Avenue, Wichita, Kansas, a terminal building located at 115 Eleventh Street, Des Moines, Iowa, and a terminal building located at 611 South Main Street, Burlington, Iowa, and therefore denies that plaintiff operates said terminal buildings.

Further answering, this defendant states he has no information sufficient to form a belief as to the number of pieces of motor equipment plaintiff has in rendering service in the transportation of property for hire nor the number of pieces of motor equipment plaintiff has leased for said purpose and therefore denies plaintiff owns and operates thirty-seven (37) pieces of motor equipment in rendering service in the transportation of property in interstate commerce, and has leased thirty-two pieces (32) of motor equipment which he also operates in rendering service in the transportation of property between the States of Illinois, Missouri, Kansas, and Iowa.

VI

This defendant answering the sixth paragraph of the Bill says he has no information sufficient to form a belief as to the allegations therein contained and therefore denies plaintiff has invested large sums of money in motor vehicles, trucks, tractors and semi-trailers, and in terminal facilities; that he has established regular and convenient routes of travel for said motor vehicles between the terminals alleged [fol. 52] in the Bill; that he maintains at said terminals agents and employees for receiving, checking, billing, and forwarding property for transportation; that he maintains proper and sufficient motor equipment, commonly known as road trucks, for the transportation of property between terminals, and provides and maintains at said terminals motor vehicles for rendering pick-up and delivery service between his terminals and consignors and consignees, as set out in the sixth paragraph of the Bill; specicically denies that he maintains said motor vehicles, both highway and terminal motor vehicles, as set out in plaintiff's tariff now on file with the Interstate Commerce Commission, as alleged in the sixth paragraph of the Bill.

VII

This defendant further answering states he has no information sufficient to form a belief as to the allegations contained in the seventh paragraph of the Bill and therefore denies that plaintiff assembles at his terminals large numbers of shipments through the use of his pick-up equipment, which shipments are then loaded into the motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which the shipments are destined, and are there transferred to the dock and reloaded into the various delivery trucks to be delivered to the various consignees in the commercial areas, as alleged in plaintiff's Bill. Specifically avers the fact to be that this defendant that plaintiff operates in the prosecution of his business a terminal building located at Shawnee and Adams Streets in Kansas City, Kansas, as alleged in the fifth paragraph and referred to in the seventh paragraph of the Bill, but avers the fact to be that plaintiff does not operate a terminal building at Shawnee and Adams Streets, Kansas City, Kansas and does not own and operate pick-up equipment at

[fol. 53] said terminal *at said terminal* through which he assembles large numbers of shipments, which shipments are then loaded into motor vehicles commonly known as road trucks and transported by said road trucks to the terminal to which said shipments are destined, as alleged in the seventh paragraph and referred to in the fifth paragraph of the Bill.

VIII

This defendant further answering states he admits the Seventy-Fourth Congress of the United States passed an Act, approved August 9, 1935, known as "Motor Carrier Act, 1935." Admits that by said Act the Interstate Commerce Commission was given exclusive jurisdiction to grant certificates of convenience and necessity to common carriers by motor vehicles in interstate commerce, to regulate rates and service of said carriers in interstate commerce. Further answering, this defendant says he has no information upon which to form a belief as to whether plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form BMC 1, as provided by said Interstate Commerce Commission, said application being Docket No. MC-61959, and has filed with the Interstate Commerce Commission a schedule of rates for said transportation, and, therefore, denies that plaintiff in conformity to said Motor Carrier Act of 1935 has filed with the Interstate Commerce Commission an application on Form DMC 1, as provided by said Inter-state Commerce Commission, said application being Docket No. MC-61959; denies that plaintiff filed with the Interstate Commerce Commission a schedule of rates for interstate transportation, and specifically denies that plaintiff has complied with all requirements of said Motor Carrier Act of 1935 and the orders of the Interstate Commerce Commission, as alleged in the eighth paragraph of the Bill.

[fol. 54] IX

Answering the allegations in the ninth paragraph of the Bill, this defendant admits that on November 23, 1934, the Public Service Commission of Missouri issued to plaintiff an Inte state Permit No. T-3734; admits that plaintiff filed with the Public Service Commission insurance policies and paid license fees and taxes, as required by the Public Serv-

ice Commission Law of Missouri, for the transportation of property for hire over the highways of the State of Missouri for interstate movements and in interstate commerce only. Further answering, this defendant specifically denies that plaintiff has fully complied in all respects with the laws of the State of Missouri and the orders of the Public Service Commission of Missouri.

Further answering, this defendant admits that on July 22, 1936 the Public Service Commission instituted a proceeding to revoke the authority of Frank Eichholz, doing business as Riteway Motor Service, and holder of Interstate Permit No. T-3734 theretofore issued by the Public Service Commission of Missouri, said proceedings being docketed as Case No. T-5330; admits that on December 10, 1936 the Commission issued its order in Case T-5330 and revoked the permit and authority of plaintiff to operate in interstate commerce as a freight-carrying motor carrier over the highways of Missouri; admits that by subsequent order of said Public Service Commission the effective date of its order of December 10, 1936 was extended to December 30, 1936.

X

This defendant further answering states he admits that on December 16, 1936, plaintiff filed with the Public Service Commission of Missouri an application for rehearing in [fol. 55] said Case T-5330; that on December 23, 1936 defendant Commission issued its order overruling said application for rehearing. This defendant specifically denies that under the decisions of the Court of Appeals and the Supreme Court of Missouri no appeal can be taken to the courts of last resort in the State from this order of the Public Service Commission.

Further answering, this defendant denies that the action of defendant Public Service Commission in issuing its said order of December 10, 1936 was unlawful, unreasonable, arbitrary and capricious; denies that the Public Service Commission of Missouri attempted to exercise power and authority expressly delegated by the Congress of the United States to the Interstate Commerce Commission.

This defendant further answering denies that said order of defendant Public Service Commission, issued on December 10, 1936, is or was a direct burden and interference with interstate commerce and deprives plaintiff of his right

to engage in interstate commerce; denies that the public is deprived of the use of plaintiff's facilities in the transportation of property in interstate commerce.

XI

Answering the eleventh paragraph of the Bill this defendant denies that this defendant is threatening to arrest the drivers of said plaintiff's vehicles, thereby destroying the business of plaintiff; denies he has any intention to cause the arrest of plaintiff under the laws of the State of Missouri; denies that he is threatening or attempting to cause the filing of informations purporting to charge plaintiff with violations of law which will work irreparable damage to the public who are dependent on plaintiff for the transportation by plaintiff of their property.

[fol. 56] Further answering, this defendant denies that the order of these Defendants of December 10, 1936 is contrary to and in violation of the Motor Carrier Act of 1935; denies that said order of December 10, 1936 is in *in* violation of Article 3 of the Constitution of Missouri; specifically denies that said order of the Public Service Commission of December 10, 1936 was or is in violation of Sections 1, 24 and 25 of Article 4 of the Constitution of Missouri; denies that plaintiff was without adequate remedy at law; denies that the acts of the Public Service Commission complained of in the Bill are illegal, without warrant and in direct interference with interstate commerce; denies that said actions invade the rights of plaintiff and deprive plaintiff of his liberty and property without due process of law in contravention of that part of Section 1 of Article 14 of the Constitution of the United States which provides as follows:

"No state shall make or enforce any laws which shall abridge the privilege or immunities of a citizen of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

Further answering, this defendant denies that said order of defendant Commission of December 10, 1936 was and is in violation of Section 8 of Article 1 of the Constitution of the United States.

XII

Further answering, this defendant states that he denies that unless the defendant in this cause is restrained and enjoined from arresting and filing criminal charges against and prosecuting plaintiff, his drivers and employees, plaintiff will be required to defend a multiplicity of criminal actions; denies that plaintiff's property and business will [fol. 57] be destroyed; specifically denies that plaintiff has no other adequate remedy at law.

B. M. Casteel, Superintendent of Missouri, State Highway Patrol, by Roy McKittrick, Attorney-General; Covell R. Hewitt, Assistant Attorney-General.

Duly sworn to by Covell R. Hewitt. Jurat omitted in printing.

[fol. 58] In United States District Court

Memorandum Opinion and Findings of Fact on Plaintiff's Application for a Temporary Injunction—Filed February 3, 1937

Per Curiam:

Frank Eichholz, the plaintiff, is a common carrier of freight by automobile trucks, operating over established lines between terminal buildings belonging to him and located in St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. His contention is that he is engaged in interstate commerce only. On the theory that he proposed to and would engage only in interstate commerce in Missouri, he applied for and on November 23, 1934, was granted by the Public Service Commission an "interstate permit," authorizing him to operate over the highways of Missouri in interstate commerce. Subsequently, by an order effective December 30, 1936, the Public Service Commission revoked the permit granted in [fol. 59] 1934. The defendants having threatened to cause the arrest of plaintiff's employees, operating his trucks, if they operate them after December 30, 1936, plaintiff filed his bill here, setting up inter alia the facts stated and praying injunctive relief. The question now to be determined is whether plaintiff shall have a temporary injunc-

tion restraining defendants from proceeding against plaintiff and his employees for operating plaintiff's trucks on the highways of Missouri.

Upon the question stated we have heard evidence (in the form of a transcript of the testimony taken by the Public Service Commission and in the form of affidavits), all of which, together with the allegations of the verified bill and the argument of counsel we have considered.

The theory upon which the plaintiff's permit was revoked (that theory is best presented in the report of the Public Service Commission accompanying its order of revocation) is that the plaintiff has abused its privileges under its permit in that actually it has engaged in intrastate commerce, fraudulently undertaking to give to its intra-state commerce the appearance of interstate commerce by unnecessarily crossing a state line in the transportation of goods from one point in Missouri to another point in Missouri. This crossing of a state line, the Commission found, was a mere sham and pretext whereby plaintiff sought to avoid state supervision and to undercut intrastate freight rates.

In justice to the Public Service Commission it should be said that at the hearing before that body the plaintiff here [fol. 60] put on no testimony. There the plaintiff maintained that, whatever is its motive in crossing a state line with goods being shipped from one point in Missouri to another point in Missouri and however artificial the crossing of the state line is, if it does cross a state line the commerce is interstate and not subject to state regulation. The evidence before us presents perhaps a truer picture of the nature of plaintiff's business than that which was considered by the Commission.

The essential facts, as they are disclosed at this stage of this proceeding, are these (and we find them to be the facts):

1. The plaintiff transports freight by automobile trucks as a common carrier between freight terminals or depots located in St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. By far the largest part of its business consists of the transportation of goods from points in one state to points in other states. A small percentage of its business (approximately 5%) consists in the transportation of goods from

points in Missouri to other points in Missouri, chiefly from Kansas City, Missouri, to St. Louis, Missouri, and from St. Louis, Missouri, to Kansas City, Missouri.

2. At St. Louis, Missouri (and so also at each of the cities at which plaintiff has a terminal or depot) the plaintiff renders to its patrons a so-called "pick up" service. This service it renders to all its patrons living within a circle having a radius of twenty-five miles, the center of which is at the plaintiff's terminal or depot. The plaintiff picks up at the place of business of a patron the consignment he desires to have transported, carries that consignment to the terminal or depot, unloads it on a dock there situated, thence it is loaded on a line truck and by that line truck transported to some other of the plaintiff's terminals or depots. [fol. 61] It is unloaded from the line truck at the terminal or depot of its destination. At that terminal or depot, as at each other of plaintiff's terminals or depots, a "delivery service" is rendered by plaintiff. Plaintiff causes the shipment to be loaded on to a delivery truck and by that truck carried to the place of business of the consignee. This "delivery service," like the "pick up" service, is rendered to patrons of the plaintiff living within a circle having a twenty-five mile radius, the center of which is the terminal or depot of the plaintiff. Since the St. Louis "pick up" service area of the plaintiff, the center of which is the St. Louis, Missouri, terminal of the plaintiff, necessarily includes a part of Missouri, and since the Kansas City, Kansas "delivery" area, the center of which is at the plaintiff's terminal in Kansas City, Kansas, necessarily also includes a part of Missouri, some consignments will be from consignors whose places of business are in Missouri to consignees whose places of business also are in Missouri. All consignments, however, from the St. Louis, Missouri "pick up" area to the Kansas City, Kansas, "delivery" area are transported in due and regular course of plaintiff's business (and necessarily are so transported) from plaintiff's terminal or depot in St. Louis, Missouri, to plaintiff's terminal or depot in Kansas City, Kansas. So also as to consignments from the Kansas City, Kansas, "pick up" area to the St. Louis, Missouri, "delivery" area.

3. Conforming with the laws enacted by Congress plaintiff has filed with the Interstate Commerce Commission

schedules of its rates for the transportation of freight and full information touching the points between which it carries freight, and in connection with each of these points a full statement as to the "pick up" and "delivery" service there rendered and the areas within which that service is rendered, all of which it is required to do by laws enacted by Congress. The plaintiff carries no freight except in accordance with its freight rates on file with the Interstate Commerce Commission. Plaintiff carries no freight between any points in Missouri save and except that which in the usual and regular course of its business it carries from a terminal in one state to a terminal in another state.

In view of what at the present stage of this proceeding we have found to be the facts (the final hearing may, of [fol. 62] course, disclose entirely different facts) it is not necessary for us to inquire whether, if the plaintiff actually was engaged in what really is intra-state commerce, carrying goods from one point in Missouri to another point in Missouri, endeavoring by sham and subterfuge to make that business appear to be interstate commerce, it would be subject to regulation by the state. Upon the facts which have been found no question can by made but that all of the business carried on by plaintiff is interstate commerce and that there is present in plaintiff's plan of business no sham or subterfuge that might conceivably, when removed, be found to cover up what really is commerce intra-state.

A temporary injunction will issue. Counsel for plaintiff will submit to the court for approval and entry an appropriate decree and with it an appeal bond in the amount of $1,000 to secure the defendants against damage.

[fol. 63] IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY INJUNCTION—Filed February 15, 1937

Now on this 23rd day of January, 1937, comes the plaintiff by his attorney, and defendants Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of the State of Missouri; Roy McKittrick, Attorney-General of the State of Missouri; and B. M. Casteel, Superintendent, State High-

way Patrol, by their attorney, and the application of the plaintiff for a temporary injunction is duly called for hearing.

From said verified bill for injunction filed herein and the transcript of the testimony taken before the Public Service Commission and affidavits herein filed, the Court finds as follows:

1. The plaintiff transports freight by automobile trucks as a common carrier between freight terminals or depots located in St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. By far the largest part of its business consists of the transportation of goods from points in one state to points in other states. A small percentage of its business (approximately 5%) consists in the transportation of goods from points in Missouri to other points in Missouri, chiefly from Kansas City, Missouri, to St. Louis, Missouri, and from St. Louis, Missouri, to Kansas City, Missouri.

2. At St. Louis, Missouri (and so also at each of the cities at which plaintiff has a terminal or depot) the plaintiff renders to its patrons a so-called "pick-up" service. This service it renders to all its patrons living within a circle having a radius of twenty-five miles, the center of which is at the plaintiff's terminal or depot. The plaintiff picks up at the place of business of a patron the consignment he desires to have transported, carries that consignment to [fol. 64] the terminal or depot, unloads it on a dock there situated, thence it is loaded on a line truck and by that line truck transported to some other of the plaintiff's terminals or depots. It is unloaded from the line truck at the terminal or depot of its destination. At that terminal or depot, as at each other of plaintiff's terminals or depots, a "delivery service" is rendered by plaintiff. Plaintiff causes the shipment to be loaded on to a delivery truck and by that truck carried to the place of business of the consignee. This "delivery service," like the "pick up" service, is rendered to patrons of the plaintiff living within a circle having a twenty-five mile radius, the center of which is the terminal or depot of the plaintiff. Since the St. Louis "pick up" service area of the plaintiff, the center of which is the St. Louis, Missouri, terminal of the plaintiff, neces-

sarily includes a part of Missouri, and since the Kansas City, Kansas "delivery" area, the center of which is at the plaintiff's terminal in Kansas City, Kansas, necessarily also includes a part of Missouri, some consignments will be from consignors whose places of business are in Missouri to consignees whose places of business also are in Missouri. All consignments, however, from the St. Louis, Missouri "pick up" area to the Kansas City, Kansas, "delivery" area are transported in due and regular course of plaintiff's business (and necessarily are so transported) from plaintiff's terminal or depot in St. Louis, Missouri, to plaintiff's terminal or depot in Kansas City, Kansas. So also as to consignments from the Kansas City, Kansas, "pick up" area to the St. Louis, Missouri, "delivery" area.

3. Conforming with laws enacted by Congress plaintiff has filed with the Interstate Commerce Commission schedules of its rates for the transportation of freight and full information touching the points between which it carries freight, and in connection with each of these points a full statement as to the "pick up" and "delivery" service there rendered and the areas within which that service is rendered, all of which it is required to do by laws enacted by Congress. The plaintiff carries no freight except in accordance with its freight rates on file with the Interstate Commerce Commission. Plaintiff carries no freight between any points in Missouri save and except that which in the usual and regular course of its business it carries from a terminal in one state to a terminal in another state.

[fol. 65] It is therefore ordered, adjudged and decreed by the Court that the defendants, Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of the State of Missouri; Roy McKittrick, Attorney-General of the State of Missouri; and B. M. Casteel, Superintendent, State Highway Patrol, and each of them, their respective agents, servants and employees be and they are hereby restrained and enjoined pending a final determination of this cause from arresting, prosecuting, or assisting in the prosecution of any criminal suit against plaintiff for using the highways of the State of Missouri in the transportation of property for hire by motor vehicle.

This temporary injunction shall become effective on the giving of security by the plaintiff by filing a bond in the sum

of One Thousand Dollars ($1000.00), conditioned upon the payment of such costs and damages as may be incurred and suffered by any of the parties who may be found to have been wrongfully enjoined or restrained hereby.

Dated this 15th day of February, 1937.

Kimbrough Stone, United States Circuit Judge. Albert L. Reeves, United States District Judge. Merrill E. Otis, United States District Judge.

[fol. 66] In United States District Court

Notice of Motion

To D. D. McDonald, Counsel for Plaintiff in the Above Entitled Cause:

You are hereby notified that the undersigned Defendants will, on Friday, April 30, 1937, file in the Federal Court at Kansas City, Missouri the within and attached motion of which you will take notice and govern yourself accordingly.

James P. Boyd, General Counsel, Public Service Commission of Missouri; Daniel C. Rogers, Assistant Counsel, Public Service Commission of Missouri, Solicitors for Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of the State of Missouri.

Received copy of the above notice together with copy of motion this 28th day of April, 1937.

D. D. McDonald.

[fol. 67] In United States District Court

Motion to Dissolve Temporary Injunction—Filed April 30, 1937

Come now Defendants, Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of the State of Missouri, and for their joint and separate motion move the Court to set aside its order of February 15, 1937 granting temporary injunction against these Defendants and other defendants named

in the bill in the above entitled cause and to hear the case upon its merits.

These movants further state to the Court that since the hearing of this case there has been new and additional evidence of the Plaintiff on various and divers occasions transporting property in intrastate commerce within the State of Missouri; that in order to show that the Plaintiff has been engaged in intrastate commerce within the State of Missouri [fol. 68] in violation of his right to transport property for hire over the highways of the State of Missouri, it will be necessary to take evidence of witnesses in Kansas City, Missouri, St. Louis, Missouri and other points in Missouri; that it is the belief of these Defendants time will be saved for this Court and expenses will be saved for these litigants if a Special Master should be appointed by this Court to hear the evidence in this case at Kansas City, Missouri, Jefferson City, Missouri, St. Louis, Missouri and any other points the Master may order or direct and make the finding for this Court; that if the Court find in its discretion such would be to the best interests of the Court and the litigants herein, the Court make such an order.

Wherefore, these Defendants pray the Court to set aside its order and dissolve the temporary injunction heretofore granted in this cause, that upon final hearing the permanent injunction be denied and these Defendants be dismissed with their costs in this behalf laid out and expended, and for such other and general orders as seem meet in the premises.

James P. Boyd, General Counsel, Public Service Commission of Missouri; Daniel C. Rogers, Assistant Counsel, Public Service Commission of Missouri, Solicitors for Sam O. Hargus, W. M. Anderson, John S. Boyer, Albert D. Nortoni, John A. Ferguson, Public Service Commissioners of the State of Missouri.

[fol. 69] IN UNITED STATES DISTRICT COURT

SUPPLEMENTARY ANSWER AND COUNTERCLAIM OF DEFENDANT PUBLIC SERVICE COMMISSION—(Rec'd in Custody of the Clerk But Not Filed as Part of This Case, February 2, 1938)

Comes now Public Service Commission, one of the defendants in the above entitled cause and, with permission of the

Court, files this supplementary answer as its counterclaim against plaintiff for fees owing by plaintiff to the State of Missouri for the use of its public highways, and states that plaintiff's liability to the State of Missouri for such fees has occurred since the filing of plaintiff's bill in equity.

This defendant states that plaintiff since the filing of his original bill has continued to operate upon and over the highways of the State of Missouri, daily, large numbers of trucks carrying property as a common carrier or motor carrier. Defendant states that plaintiff does now and will at the determination of this cause of action owe the State of Missouri a large amount of money in the nature of fees for the use of its public highways since approximately January 1, 1937.

Defendant states that the number of trucks and the times and places of their operation upon and over the highways of the State of Missouri constitutes information wholly within the knowledge of the plaintiff, and states that it does not have access to plaintiff's records or other means to determine the amount of money owing by plaintiff to the State of Missouri, and states that only by an accounting conducted under the jurisdiction of this Court may defendant and the State of Missouri have an adequate remedy for recovery of the aforesaid fees.

Wherefore, defendant Public Service Commission prays the Court to take jurisdiction of this counterclaim as an action in equity, and to provide the means whereby the amount of moneys owing by plaintiff to the State of Missouri may be equitably and accurately determined, and for such other relief in the premises as the Court may deem just and proper.

James P. Boyd, and Daniel C. Rogers, Solicitors for Public Service Commission.

[fol. 70] In United States District Court

Before Stone, Circuit Judge, and Reeves and Otis, District Judges

Opinion—Filed March 24, 1938

Reeves, J.:

This is a suit to enjoin the cancellation or revocation of a permit granted to plaintiff as an interstate motor carrier,

and bearing date November 23, 1934. The order of revocation was made effective December 30, 1936. A temporary injunction was granted January 23, 1937, and the case was tried and submitted on final hearing February 2, 1938.

An order of a state administrative board being challenged, a three-judge court was constituted in conformity with Section 380, Title 28, U. S. C. A.

[fol. 71] Section 5268 (b), Laws Missouri 1931, relating to Motor Vehicles, provides for the granting of permits by the Public Service Commission of the State of Missouri to motor carriers desiring "to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce * * *."

In accepting such permits the carriers become obligated to pay certain license fees at times and in accordance with schedules prescribed by law.

By Section 5269, Laws Missouri, 1931, supra., "The commission may at any time, for good cause, suspend, and upon at least ten days notice to the grantee of any certificate, and an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this act."

The permit granted to the plaintiff by the Public Service Commission of Missouri authorized him to "operate interstate as a freight carrying motor carrier over an irregular route as follows: From all points in Missouri to points beyond the state and from points beyond Missouri to all points within the state, exclusively in interstate commerce."

At the time this permit was granted there was in effect a rule (having the force of law) promulgated by the Public Service Commission of Missouri as authorized by Statute, and known as Rule No. 44. By this rule the holders of interstate permits were forbidden to transport within the state property accepted in the state and "known to be destined to a point within the state of Missouri." It was further provided that "if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the state of Missouri such property shall not be terminated within the state of Missouri."

[fol. 72] The reason for the attempted cancellation of plaintiff's interstate permit was, as it was charged, that he was operating in violation of said permit. Such violation consisted in carrying property from one point in Missouri to another point in Missouri as an intrastate carrier whereas he did not have a license as such.

Although the plaintiff made no complaint of the license fees exacted under the laws of Missouri, nevertheless, he has not paid the usual fees since the granting of the temporary restraining order on December 31, 1936. He has been carrying on his regular business as a carrier under the protection of this court's restraining order. As a result, a supplemental answer has been filed asking this court to grant a hearing in the nature of an accounting of fees to the State of Missouri from the plaintiff on account of his operations since the protective restraining order was granted.

The temporary injunction heretofore granted by this court was predicated upon the record of evidence before the Public Service Commission, ex parte affidavits, and some additional oral testimony. At that time it was made to appear that a small percentage of the property carried by plaintiff was between points in Missouri, and that such transportation was effected by carriage from St. Louis, Missouri, to a terminal station in Kansas City, Kansas, and, that, because of a zone within which a pickup service was authorized, a small amount of property was picked up in Kansas City, Missouri, assembled at the terminal in Kansas City, Kansas, and then transported to St. Louis, Missouri for delivery. [fol. 73] The facts as then presented warranted the court in issuing a temporary injunction, as a matter of judicial "convenience" until final hearing on the merits. Plaintiff has regular line hauls and fixed terminal depots. Its chief line hauls are between its terminals or depots at St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. Between these points admittedly it hauls a large volume of freight. From its depot or terminal point at Kansas City, Kansas, it has a pickup zone with a radius of twenty-five miles. Its terminal in Kansas City, Kansas, is within one-half mile of the Missouri State Line and a very few blocks from the trafficway connecting Kansas City, Kansas with Kansas City, Missouri.

At that point, according to the testimony, it is in very close proximity to several heavy shippers, including meat packers. There is an inference from the testimony that it hauls considerable property for these shippers. During its operations it has carried a great deal of merchandise from shippers or consignors at St. Louis, Missouri, to consignees in Kansas City, Missouri. In many instances such shipments were made in truckload lots so that the plaintiff

continued the line haul from his terminal in St. Louis to the depot or terminal in Kansas City, Kansas, and a new driver, and probably a new tractor, made the delivery by transporting the same merchandise or property back into Missouri over the identical trafficways used in going to the terminal in Kansas City, Kansas.

Plaintiff testified that its transportation of property or merchandise between points in Missouri aggregated 10 per cent. of his traffic. One witness for the defendant testified that the percentage aggregated 40 per cent. of the entire [fol. 74] business across the state. Another witness testified that the intrastate traffic would aggregate 25% of the total volume. In many instances it was the habit of shippers in Missouri to consign their merchandise to themselves or some person at the terminals in Kansas City, Kansas, and then reconsign the same merchandise to a Missouri point.

Other facts will be stated as they become pertinent in the course of this memorandum opinion.

1. At the outset, it is contended by the plaintiff that, having engaged in interstate commerce, the acts of Congress would be supreme and exclusive, and that he is not subject to supervision by state authorities.

Such was the holding in Missouri Pacific Railroad Co. v. Stroud, 267 U. S. 404, loc. cit. 408. The court said: "It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive."

An examination of the national Motor Carriers Act, however, does not reveal an intention of the Congress to occupy the entire field and to exclude the authority of the states. Section 302, Title 49, U. S. C. A. contains a "Declaration of policy and delegation of jurisdiction to Interstate Commerce Commission." By subdivision (a) of said Section it is the expressed purpose of the Congress to "cooperate with the several states and the duly authorized officials thereof * * * in the administration and enforcement of this chapter." And then, by subdivision (c): "Nothing in this chapter shall be construed to affect the powers of taxation of the several states *or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each state of the* [fol. 75] *power of regulation of intrastate commerce by motor carriers on the highways thereof.*"

It will be seen from the foregoing that it was the intention of the Congress to leave with each state the exclusive right to regulate and control intrastate commerce by motor carriers on the highways of such state. This exclusive right could not be exercised properly if the state were compelled to await a determination and a conclusion of the interstate commerce commission in every case as to whether traffic belonged to interstate commerce or to intrastate commerce. It must be obvious that in case the Interstate Commerce Commission should determine that a particular haul or carriage was interstate commerce, a ruling to the contrary by the state authorities would be unavailing, but in the absence of conflict, the decision of the State authorities would prevail.

Again, it appears from the evidence that the Interstate Commerce Commission, because of a congestion of applications from motor carriers, has been unable to exercise prompt supervision over interstate motor carriers.

In the case of Sproles v. Binford, 286 U. S. 374, l. c. 390, the court said:

" 'In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' "

This principle was taken and approved from the case of Morris v. Duby, 274 U. S. 135.

The rule announced in the Minnesota Rate cases, 230 U. S. 352, was to the effect that the states may act within their [fol. 76] respective jurisdictions until Congress sees fit to act. In this case, while the Congress has acted, it has not only left with the states a large measure of authority in determining what is and what is not intrastate commerce, but it has not as yet been able to make its legislation effective. Until that has been done the federal courts must, in a large measure, recognize state regulations and follow the decisions upon such regulations by the duly constituted state authorities. In this case, the Public Service Commission of the State, after due process, has determined that the plaintiff was engaging in intrastate commerce, and that because of such violation of its interstate permit the com-

mission exercised its right under the statute to cancel such permit.

2. However, assuming that the ruling of the Public Service Commission of Missouri is not binding upon us, in the absence of a definite contrary ruling by the interstate commerce commission, the question for us to determine is whether the operations of the plaintiff as gleaned from the above facts were, in part at least, intrastate. This is purely a factual question. Ohio R. R. Commission v. Worthington, 225 U. S. 102, loc. cit. 108.

As said in the last case, loc. cit 110, "The test of through billing is not necessarily determinative" of the question as to whether it is intrastate or interstate commerce.

The subject was discussed in Southern Pacific Terminal Co. v. Interstate Commerce Commission and Young, 219 U. S. 498, where a shipment was made from sundry points in Texas to a shipper as consignee at Galveston. At that [fol. 77] point the property shipped was prepared for export. The court properly held that such transportation was within the jurisdiction of the Interstate Commerce Commission. The shipper was denied the advantage of a lower tariff, because the court said that it constituted an undue preference in his favor.

In the case of Baltimore & Ohio S. W. R. R. Co. v. Settle, 260 U. S. 166, loc. cit. 170, the court said:

"And whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration."

The court then cited some of the cases hereinbefore discussed, as well as Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111, Railroad Commission of Louisiana v. Texas & Pac. Ry. Co., 229 U. S. 336.

Conversely to the contentions here made, the Supreme Court held in Baltimore & Ohio Co. v. Settle, supra, adopting the same principle announced in Baer Bros. Mercantile Co. v. Denver & R. G. R. R. Co., 233 U. S. 479:

"That a carrier cannot, by separating the rate into its component parts, charging local rates and issuing local way

bills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of the benefit of an appropriate rate for a through interstate movement."

In this case, the plaintiff hauled truckloads of merchandise from shippers or consignors in St. Louis, Missouri, to consignees in Kansas City, Missouri. It was neither a normal nor a natural route, to extend the carriage to the terminal depot in Kansas City, Kansas. There was no reason for it. It was not a matter of convenience to the shipper, [fol. 78] nor was it a matter of convenience to the carrier. Immediately that the haul terminated at the depot or terminal in Kansas City, Kansas, a new driver and in some instances with the same tractor took the merchandise or property back over the same trafficway and effected immediate delivery in Kansas City, Missouri. It was patent that the object of the shipper was to secure the benefit of a lower tariff by converting the shipment into an interstate haul. The shipping charges were approximately one-third less if in interstate commerce than if in intrastate commerce.

The plaintiff has cited in support of his contention the very recent case of Roundtree v. Terrell, et al., decided February 17, 1938, in the Northern District of Texas. That case, as this case, pended before a three-judge court. The motor carrier hauled merchandise from points in Texas, through Texarkana to Little Rock, Arkansas. Some of the shipments or consignments were unloaded at a terminal or depot in Texarkana, Arkansas, and then carried back and delivered to consignees at Texarkana, Texas. The Texas court upheld the operation as interstate commerce. In doing so, it said that the pickup or delivery truck at Texarkana was not a line haul truck, but it was a local truck bearing an Arkansas license. It said, furthermore, that the merchandise from the line haul came to rest and was unloaded at the carrier's depot in Texarkana, Arkansas. The court further found concerning the shipment:

"It is unloaded there in the night time, and the next morning the local delivery truck makes delivery of it within the municipal limits to whichever side of the city it may be consigned. * * * The line trucks reach Texarkana about four or five o'clock in the morning, all places of business are closed, such freight as is consigned to that point is un- [fol. 79] loaded and locked in the warehouse, the line truck then proceeds on to Little Rock. * * * The freight which

originates in Texas and is subsequently delivered to Texarkana, Texas, must be and is transported over the line into Arkansas, and comes to rest in the warehouse in that state."

The court then said concerning this method of operation:

"It would not seem appropriate to compel the complainant to deliver freight in Texarkana, Texas, as he passes through in the night time rather than following his legally chosen method of unloading it at his warehouse and then delivering it to the consignee, by another carrier, during business hours."

The situation here is vastly different. In a few instances no doubt the merchandise picked up at St. Louis is unloaded at the terminal or depot in Kansas City, Kansas, and, in that event, as we held on our first hearing, such operation would not be a violation of the interstate permit. On this point, it appears that the Congress intended to leave to the states the exclusive right to control and supervise shipments between points in the same state, even though, by reason of an interstate routing, the property was given an interstate character. The last proviso of Subdivision (a) of Section 306, Title 49, U. S. C. A. is as follows:

"And provided further, that this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

Quite obviously the Congress undertook to avoid controversies and disputes such as the one involved in this case. The Interstate Commerce Commission would exercise jurisdiction over such commerce only in those cases where the state authorities had failed to do so.
[fol. 80] The facts in this case are similar to Sprout v. South Bend, 277 U. S. 160, loc. cit. 168, where the court said:

"The legal character of this suburban bus traffic was not affected by the device of requiring the payment of a fare

fixed for some Michigan point or by Sprout's professing that he sought only passengers destined to that State. *The actual facts govern.* For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce."

The testimony in support of the plaintiff tended to show that his depot or terminal in Kansas City, Kansas was in close proximity to a number of large shippers. The inference intended to be drawn was that it was because of these shippers that the terminal was located in Kansas City, Kansas and so close to the line between the states of Missouri and Kansas. It might be questioned, however, with a pickup and delivery zone with a radius of 25 miles, if the depot were so positioned as to accommodate heavy shippers whose factories and places of business were nearby.

Plaintiff's pickup zone at Kansas City, Kansas was so laid out as to cover Kansas City, Missouri. By this device, the plaintiff could carry all the intrastate shipments between St. Louis and Kansas City and extend to the shippers an interstate rate far below the tariffs for purely intrastate hauls. The arrangement could not be justified upon a theory that it was a usual and regular route, as in the case of Mo. Pac. Railroad Co. v. Stroud, 267 U. S. 404, where the court upheld a shipment between points in Missouri as interstate commerce for the reason "that the usual and regular way [fol. 81] of routing cars loaded with lumber at Oxly and consigned to St. Louis would be over the latter route through the State of Illinois and would be interstate commerce."

3. It is a matter worthy of comment that the plaintiff accepted a license from the Public Service Commission which specifically forbade that he should haul property between points in Missouri. The Public Service Commission had promulgated a rule which prohibited the transportation of merchandise between points in Missouri under interstate permits. Such acceptance was a voluntary act on the part of the plaintiff. He had his choice, either to refrain from hauling merchandise and property between points in Missouri under his interstate permit, or to secure a certificate of convenience and necessity as an intrastate carrier. He was not under the compulsion mentioned in Union Pacific R. R. Co. v. Public Service Commission of Missouri, 248

U. S. 67, where the court said that the carrier company was compelled to take out a license or a certificate under the menace of a penalty which meant irreparable loss. The court decided that the complainant's act in accepting the terms of the certificate was not voluntary.

As said in Pullman Company v. Kansas, 216 U. S. 56, loc. cit. 66, "by accepting the privilege it has voluntarily consented to be bound by the condition."

This principle was upheld in Pierce Oil Corp. v. Phoenix Refg. Co., 259 U. S. 125.

Plaintiff would therefore have no right to challenge the validity of the said Rule No. 44.

[fol. 82] 4. The defendant has filed a supplemental pleading wherein there is a prayer for an accounting of fees accumulated during the operations of the plaintiff since the granting of the original restraining order, December 31, 1936.

While the injunction granted by this court prohibited the defendant Public Service Commission from revoking and cancelling plaintiff's permit as an interstate carrier, such injunction in nowise relieved the plaintiff of the obligation to pay statutory or prescribed license fees. No reason appears why such payments should not have been made. On the contrary, there is every reason why the plaintiff in a proceeding in equity should not meet all of the reasonable exactions of the state as condition precedent to the operations carried on by him.

Under Equity Rule 30, a defendant has a right to interpose a counter-claim "arising out of the transaction which is the subject-matter of the suit." It is doubtful whether these claims arose out of the transaction which is the subject matter of the suit, and, yet because of the injunction, the plaintiff elected to discontinue the payment of fees.

No objection having been made to the filing of the counterclaim. this court will not interpose one under the circumstances of the case. The question having been presented, it should be considered by us.

In Piedmont & N. Ry. Co. v. Query, 56 F. (2d), 172, loc. cit. 175, the court said in discussing similar questions:

[fol. 83] "And if either of these is a substantial question under the Constitution, we must proceed with the considera-

tion of the other questions presented; for in such case the jurisdiction of the court extends to every question involved, whether of federal or state law, even though the court may not find it necessary to decide the federal question."

In Sovereign Camp, W. O. W. v. Murphy, 17 F. S. 650, l. c. 652, a case like this heard before three judges sitting in the Southern District of Iowa, the court said:

"But the duty imposed on the three-judge court . . . carries with it the duty on the part of the same three-judge court to try the whole case. The parties cannot be relegated to piecemeal trials of the several issues joined by them in their case."

The same principle was announced in Greene v. Louisville Railroad, 244 U. S. 499, loc. cit. 508, where the court said that:

"The jurisdiction of that court extended, and ours on appeal extends, to the determination of all question involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all."

In view of the above, unless the parties can agree after an inspection of the records upon the amount of the accumulated fees, it will be necessary to appoint a master to take an accounting and make his report to the court.

The injunction heretofore granted will be dissolved. The parties will be given thirty days from the filing of this opinion to agree upon the amount of the accumulated fees due under the counterclaim. If such agreement is not made within that time or within an extension for that purpose granted within that time, a decree will be entered dissolving [fol. 84] the temporary injunction, refusing the permanent injunction and appointing a special master to determine the amount of fees payable under the counterclaim.

If such agreement as to fees is reached within the time above allowed, a decree will be entered dissolving the temporary injunction, refusing the permanent injunction, dismissing the bill upon its merits and awarding recovery upon the counterclaim for the amount so agree- upon.

Findings of Fact

The court finds from the evidence in the case:

1. That the carriage of property from St. Louis, Missouri, to Kansas City, Kansas, and thence back into Kansas City, Missouri, for delivery, was not the normal, regular, or usual route for shipping merchandise or property between St. Louis and Kansas City, Missouri.

2. That the terminal or depot used by the plaintiff in Kansas City, Kansas was approximately one-half mile from the Missouri State Line by a used traffic-way between Kansas City, Missouri, and Kansas City, Kansas.

3. That the route used by the plaintiff from St. Louis, Missouri, to his depot or terminal in Kansas City, Kansas, was through Kansas City, Missouri, and that the same traffic-ways were used in making deliveries of merchandise or property after same had been hauled in the first instance to the terminal in Kansas City, Kansas, and that such deliveries in-[fol. 85] volved a retracing in part of the identical routes.

4. That, after reaching the terminal or depot in Kansas City, Kansas, plaintiff in many instances did not unload the merchandise, but used the same trailer employed in making the carriage from St. Louis, and hauled said property back over the identical route used in going to his depot in Kansas City, Kansas, in making deliveries in Kansas City, Missouri, and North Kansas City, Missouri.

5. That a considerable portion of the operations carried on by plaintiff was in hauling property or merchandise between St. Louis, Missouri, and Kansas City, Missouri, and that much of such shipments was in carload lots, and that the method employed by the plaintiff was to haul such merchandise or property to his depot or terminal in Kansas City, Kansas, where a new driver, either with the same tractor and trailer, or with another tractor and the same trailer, would return the merchandise to Kansas City, Missouri.

6. That, in some instances, merchandise or property shipped between St. Louis and Kansas City was actually unloaded at the depot in Kansas City, Kansas, and then distributed to the consignees in Kansas City, Missouri. This, however, was a negligible percentage of the shipment between Missouri points.

7. That, prior to April 1, 1936, deliveries from the Kansas City, Kansas, depot to points in Missouri were made by an independent agency, but that subsequent to said date, such [fol. 86] deliveries were made by plaintiff and are now being made by him.

8. That the rates for interstate carriage between St. Louis, Missouri, and Kansas City, Kansas, were much lower than intrastate transportation tariffs between St. Louis, Missouri, and Kansas City, Missouri, and that the expense of delivery from the Kansas City, Kansas depot was not as great as the difference in tariffs.

9. That the method of operation employed by the plaintiff was designed and intended to afford shippers the benefit of a lower rate, and that the transportation service rendered by him between St. Louis, Missouri, and Kansas City, Kansas, was not in good faith.

10. That the plaintiff voluntarily accepted an interstate permit with such terms and conditions as prohibited him from hauling merchandise between points in Missouri, and that permitted him only to carry property in interstate commerce between points in Missouri and points in other states and from points in other states to points in Missouri.

11. That the license fees and other charges made by the State of Missouri against the plaintiff for the use of the highways of the State of Missouri as an interstate motor carrier during the time the restraining order and temporary injunction of this court have been in force have accumulated, but have not been paid by the plaintiff although the injuc-tive relief sought by him did not relieve him, nor was it intended to relieve him, of the obligation to pay such fees and charges, nor did he seek to be relieved of such fees and charges.

[fol. 87] The court makes the following

CONCLUSIONS OF LAW

I

That the act of the Public Service Commission in Missouri in cancelling and revoking plaintiff's permit as an interstate carrier was a valid and a constitutional exercise of its power.

II

That the plaintiff had violated the express terms of its interstate permit.

III

That the plaintiff has no right to challenge the constitutional validity of Rule Number 44 promulgated by the Public Service Commission.

IV

That the plaintiff is indebted to the State of Missouri for license fees and charges accumulated since the granting of a temporary restraining order in this case, and the state is entitled to judgment therefor.

[fol. 88] IN UNITED STATES DISTRICT COURT

Before Stone, Circuit Judge, and Reeves and Otis, District Judges

SEPARATE OPINION—Filed March 24, 1938

STONE, Circuit Judge, Separate Opinion:

I concur in the findings of fact and conclusions of law stated by Judge Reeves. I concur in much of his opinion. I desire to add a thought mainly concerned with the construction to be given to a portion of Section 303(1) of the Motor Carrier Act, 1935.

Plaintiff seeks to enjoin revocation of a permit or license issued him by the proper Missouri authorities, to operate trucks over Missouri highways in interstate commerce. At the time this permit was granted, the grant was subject to Rule 44 of the Missouri authorities which forbade such licensed interstate carriers to "accept for transportation within this State any * * * property known to be [fol. 89] destined to a point within the State of Missouri." Unless the limitation of this Rule was void as to plaintiff when the permit was issued or has become so since, it is clear that he has violated the permit and his permit or license is subject to revocation.

It seems to me this limitation was and is valid as applied to this plaintiff and as to his transactions here involved. That

this regulation affects interstate commerce is clear. Whether it is invalid depends upon whether the regulation unduly affects—burdens—interstate commerce or unduly discriminates against such commerce. This rule of law is of years standing and is declared in numerous decisions of the Supreme Court. The difficulty is not with statement of the rule but with its application to specific situations.

Rule 44 is not per se discriminatory against interstate commerce. In some instances it might be, in others it might not be. Therefore, the problem as to discrimination depends upon the facts of the particular situation.

Rule 44 had a good purpose, namely, to prevent intrastate commerce being carried on under the guise of interstate commerce and thus fraudulently removing such from the regulation and control of the State. Truck and bus transportation is peculiarly liable to such abuse. Other transportation is not because it depends upon fixed physical equipment.

Another consideration is that the highways are built, maintained and belong to the State. Necessarily, the State has a large measure of control over the use of those highways. [fol. 90] It seems clear that this Rule would be valid, absent Congressional action, even though it "materially affected" interstate commerce (S. C. State H. Dept. vs. Barnwell Bros., U. S. (decided February 14, 1938), p. 6). Is the "Motor Carrier Act, 1935" such Congressional action as to render it invalid? I think not.

It is true that that Act (Section 303 (1)) defines interstate commerce as including commerce "between places in the same state through another state", but Section 302(c) declares that "nothing in this chapter shall be construed • • • to authorize a motor carrier to do an intrastate business on the highways of any state, or to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

It seems to me that to give full force to these two provisions we should construe the word "through" as used in Section 303 not to include a situation where the carriage is merely over a state line and immediately back again for final delivery. "Through" is a word of common meaning. Primarily, it means "from one end or side to the other" (Webster's New International Dictionary). Although the word may have a more restricted meaning, if the text compels such construction, yet it is difficult to conceive a trip

from St. Louis, Missouri, across the State of Missouri, through Kansas City, Missouri, and a half mile into Kansas City, Kansas, with an early return to Kansas City, Missouri, by the same route, as being described as "through" Kansas. If it can be, then much of the power of state regulation over what is in true essence intrastate commerce can be taken [fol. 91] away merely through the subterfuge of darting across a state line and back again. I think this word "through" should be construed to cover only the situations where an ordinary and proper course of travel along a highway between the point of origin and the point of destination of a shipment would naturally result in a carriage across a state line and back again. If there is a choice of natural routes between the above points—one interstate and one intrastate—the carrier may use either and such use will determine the character of the shipment (interstate or intrastate) and the motive in making such choice is immaterial. But where the movement is merely to loop over a state line and back in an entirely unnecessary and abnormal movement, I think it should not be said that the shipment has passed "through" the other state within the meaning of the Motor Carrier Act. When we remember the relation of the state to the highways; the vast network of interlacing highways throughout the country; the number of cities at or near state lines; and the facility with which trucks and buses can cross state lines by deviation of only a few miles and thus divert what is really and truly an intrastate carriage into an interstate carriage, I think we should not construe the Act as including within interstate commerce every truck and bus that crosses a state line no matter how trivial or for what purpose.

Applying the above thoughts to the situation here we find a considerable business being done by this trucking company which is essentially an intrastate business. The feature relied upon to make it interstate business is that it [fol. 92] goes about a half mile beyond the Missouri-Kansas line and then is brought promptly back into Missouri—by the same or practically the same route used when it crossed over the state line. This is done under the guise of a "delivery service". That service extending for at least twenty-four miles into Missouri and including within that radius all of Kansas City, Missouri, North Kansas City and some miles into Clay and Jackson Counties, Mis-

souri—in short, the entire commercial and industrial territory of Kansas City, Missouri, and vicinity.

If this can be done, it seems to me it must be by ignoring the usual meaning of the word "through" and in violation of the statutory injunction that "nothing in this chapter shall be construed * * * to authorize a motor carrier to do an intrastate business on the highways of any state, or to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

[fol. 93] IN UNITED STATES DISTRICT COURT

DISSENTING OPINION—Filed March 24, 1938

OTIS, District Judge, Dissenting:

I regret exceedingly my inability to concur with my learned colleagues in the disposition of this case. I can not concur even in the Findings of Fact. Quite probably I am wrong, quite probably my colleagues are entirely right. I would not set out my views at all except that I do not wish hereafter to be understood as having concurred in ideas with which I cannot agree. I shall sign the decree, of course, since, when determined upon by the majority of the Court, it is the decree of the Court, and since I understand it is the proper practice for a dissenting judge to join in the decree.

1. After the hearing upon plaintiff's application for a [fol. 94] temporary injunction this court handed down its unanimous per curiam opinion and made Findings of Fact. The evidence received at that hearing substantially was the same as that given on final hearing. Then we unanimously were of the opinion that an injunction should issue. Since the Findings of Fact which we made then best describe (except in one trifling particular which will be indicated hereafter) the true character of plaintiff's business and the manner and method of his operation, I repeat them in haec verba here.

1. The plaintiff transports freight by automobile trucks as a common carrier between freight terminals or depots located in St. Louis, Missouri, Kansas City, Kansas,

Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. By far the largest part of its business consists of the transportation of goods from points in one state to points in other states. A small percentage of its business (approximately 5%) consists in the transportation of goods from points in Missouri to other points in Missouri, chiefly from Kansas City, Missouri, to St. Louis, Missouri, and from St. Louis, Missouri, to Kansas City, Missouri.

2. At St. Louis, Missouri (and so also at each of the cities at which plaintiff has a terminal or depot) the plaintiff renders to its patrons a so-called "pick-up" service. This service it renders to all its patrons, living within a circle having a radius of twenty-five miles, the center of which is at the plaintiff's terminal or depot. The plaintiff picks up at the place of business of a patron the consignment he desires to have transported, carries that consignment to the terminal or depot, unloads it on a dock there situated, thence it is loaded on a line truck and by that line truck transported to some other of the plaintiff's terminals or depots. It is unloaded from the line truck at the terminal or depot of its destination. At that terminal or depot, as at each other [fol. 95] of plaintiff's terminals or depots, a "delivery service" is rendered by plaintiff. Plaintiff causes the shipment to be loaded on to a delivery truck and by that truck carried to the place of business of the consignee. This "delivery service", like the "pick-up" service, is rendered to patrons of the plaintiff living within a circle having a twenty-five mile radius, the center of which is the terminal or depot of the plaintiff. Since the St. Louis "pick-up" service area of the plaintiff, the center of which is the St. Louis, Missouri, terminal of the plaintiff, necessarily includes a part of Missouri, and since the Kansas City, Kansas "delivery" area, the center of which is at the plaintiff's terminal in Kansas City Kansas, necessarily also includes a part of Missouri, some consignments will be from consignors whose places of business are in Missouri to consignees whose places of business also are in Missouri. All consignments, however, from the St. Louis. Missouri "pick-up" area to the Kansas City, Kansas, "delivery" area are transported in due and regular course of plaintiff's business (and necessarily are so transported) from plaintiff's terminal or depot in St. Louis, Missouri, to plaintiff's terminal or depot in Kansas City, Kansas. So also as to consign-

ments from the Kansas City, Kansas, "pick-up" area to the St. Louis, Missouri "delivery" area.

3. Conforming with laws enacted by Congress plaintiff has filed with the Interstate Commerce Commission schedules of its rates for the transportation of freight and full information touching the points between which it carries freight, and in connection with each of these points a full statement as to the "pick-up" and "delivery" service there rendered and the areas within which that service is rendered, all of which it is required to do by laws enacted by Congress. The plaintiff carries no freight except in accordance with its freight rates on file with the Interstate Commerce Commission. Plaintiff carries no freight between any points in Missouri save and except that which in the usual and regular course of its business it carries from a terminal in one state to a terminal in another state.

[fol. 96] The evidence received at the final hearing would justify a finding that it was 10% rather than 5% of plaintiff's business which originated in Missouri and was destined for consignees in Missouri. Such trifling difference, however, justifies no difference in the conclusions reached. Beyond any possibility of controversy, in my judgment, every part of plaintiff's business is interstate commerce. While Missouri, in the absence of Congressional occupancy of a particular field may so legislate as to affect interstate commerce (as by regulating the size of trucks, prescribing particular routes to be traversed by them, regulating the speed at which they may travel) Missouri has no power whatever, directly or indirectly, by refusal to grant a permit or by conditioning a permit granted, to prevent and prohibit interstate commerce in a single pound of freight. But that is what the Public Service Commission is endeavoring to do here. We enjoined it temporarily. We should enjoin it permanently.

In none of the formal conclusions of law announced by the majority is it ruled that any part of the carriage of freight by plaintiff is not interstate commerce. The mere fact that freight is put on board a truck in Missouri and is delivered in Missouri certainly does not make the transportation of that freight the less interstate commerce, if a state line is crossed in its transportation. Mo. Pac. R. Co. v. Stroud, 267 U. S. 404. It is suggested, however, in the

[fol. 97] opinions of the majority, that occasionally the plaintiff would carry a whole truckload of freight from a consignor in St. Louis, Missouri, to a consignee in Kansas City, Missouri, that that truckload would be carried directly past its Missouri destination over a given route to plaintiff's Kansas City, Kansas terminal, that the truck then would be turned around, perhaps with a change of tractor and a change of driver, driven back over the same given route to the consignee's place of business in Missouri, which it had passed an hour or two before. My colleagues think that that would be mere subterfuge and evasion. If that were all, I should think so too. But I do not think it would not involve interstate commerce. Such a movement would in reality be two movements, not one continuous movement, but two movements, one intra-state, the other interstate. That one of these two movements which is wholly intra-state the state may prohibit. That movement does not become interstate because an entirely independent and useless interstate movement is superimposed upon it.

But the suppositious case is not this case. I do not think the evidence in this case indicates that there ever was a single such instance in the transportation carried on by plaintiff. The evidence does indicate that occasionally, very rarely, plaintiff will carry an entire truckload of freight consigned in St. Louis, Missouri, to a consignee in Kansas [fol. 98] City, Missouri. That truck will travel over plaintiff's usual and normal route to the terminal in Kansas City, Kansas. At the terminal that truck is turned over by the driver and its load is checked but it is not unloaded and the load put in another truck, which would be a foolish and wasteful thing to do. A new tractor is attached to the same truck and with a different driver the truck is taken with its load to the consignee in Missouri. There is no evidence that that consignee ever would be on the identical road over which the truck previously had passed. In any event, that truckload must be dealt with at the terminal. There the freight must be checked and the driver relieved from further responsibility. It is not usual for freight to be thrown off a train between stations although the consignee lives between them.

As I understand the views of my colleagues, they believe there is a distinction between (a) carrying some freight from a point in Missouri to a point in Missouri as a part of a truckload (which, of course, must be separated at the

terminal from other freight in that truckload) and (b) carrying other freight from a point in Missouri to a point in Missouri, which, because it fills a truck, requires no separation at the terminal from other freight and requires no transfer from one truck to another. Carriage of character (a), my colleagues think, is interstate commerce, while carriage of character (b) is intrastate. I cannot agree that [fol. 99] the slight and altogether reasonable differences in these two methods of handling freight possibly can affect the character of the commerce involved in either. It is entirely possible that I have interpreted incorrectly the views of my colleagues.

In the separate concurring opinion of Judge Stone special emphasis is placed upon Rule 44 prescribed by the Public Service Commission. Since that rule is not set out in its precise terms in either of the opinions of my colleagues I set it out. It is as follows:

"No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier accepts within Missouri a passenger whose destination is beyond the limits of the State of Missouri, such passenger shall not be permitted to terminate the trip within the State of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri."

It seems to me this rule cannot reasonably be interpreted to apply to plaintiff's operation. It will not be so interpreted if the whole rule is read together. The second sentence of the rule makes clear what is meant by the first sentence of the rule.

It is provided in the first sentence of the rule that "No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri." But it is clear from the second sen- [fol. 100] tence that what is aimed at in the first sentence is a transportation of persons or property which is wholly within the state on a contract to transport beyond the state. That, at least, is a reasonable interpretation and it is the

only interpretation consistent with constitutional principles.

Plaintiff's operation which the Public Service Commission attacks either is interstate commerce or it is not interstate commerce. If it is not interstate commerce of course the state can prevent it for plaintiff has authority to engage only in interstate commerce. The only purpose of any reference to Rule 44 in this case is on the theory that plaintiff's operation is interstate commerce of such a character as violates Rule 44 and that Rule 44, if construed to apply to that operation, is a valid rule. I have said that the rule should not be interpreted to apply to plaintiff's operation. I now say that if so interpreted it has no validity whatever.

Whence did the Public Service Commission derive any authority to adopt Rule 44? Undoubtedly from Section 5267 (b) R. S. Mo. 1929, as amended, where it is set out that—"The Public Service Commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers." But into that statute must be read the implied provision that no such rule or regulation may violate the federal Constitution. Given a rule or regulation, no such construction should [fol. 101] be placed upon it as will make it violative of the federal Constitution.

Judge Stone believes that even although Rule 44 is interpreted to apply to plaintiff's operation (and the Public Service Commission has so interpreted it), nevertheless it may be valid, that it only "affects" interstate commerce. It is at that point that I find myself unable to concur with my learned colleague. As now interpreted the rule does not "affect" interstate commerce, it prohibits it. Note the very language of the rule: "No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri." I may be utterly in error, but certainly it is my view that no state can prohibit, by any method, interstate commerce in any subject of legitimate commerce. No state can do that whether or not Congress has legislated in the field.

Even in the field of regulations which do not prohibit but only affect interstate commerce the power of the state vanishes when once Congress has assumed jurisdiction and has legislated. Exactly that is the situation here. Congress

has legislated in the field of transportation in interstate commerce by motor vehicles. Motor Carrier Act 1935. Section 303(1) of that Act defines interstate commerce so as to include commerce "between places in the same state [fol. 102] through another state." My learned colleague believes that the word "through" in the Congressional definition (which was but the restatement of several decisions of the Supreme Court) does not describe "a situation where the carriage is merely over a state line and immediately back again for final delivery." The definition from Webster's Dictionary is set out, indicating that the primary meaning of "through" is, "from one end or side to another." But if that primary meaning is the meaning here, the word certainly was misused.

I think the meaning is that in which the word "through" was used by Mr. Justice Holmes in Western Union Telegraph Co. v. Speight, 254 U. S. 17. In that case a telegraphic message originated in North Carolina and was for transmission to a point in the same state. It was so routed as to pass through a part of Virginia. It was found as a fact that that routing was "for the purpose of fraudulently evading liability under the law of North Carolina." Mr. Justice Holmes said: "The transmission of a message *through* two states is interstate commerce as a matter of fact. The fact must be tested by the actual transmission." Again he said: "The court below * * * held that when as here the termini were in the same state the business was intrastate *unless it was necessary to cross the territory of another state* in order to reach the final point. This * * * is not the law."

[fol. 103] It seems to me that the word "through," as used by Congress, cannot be limited in its meaning to a more or less extensive carriage through another state (who will determine the minimum carriage which will amount to carriage "through" another state?). Certainly it should not depend upon the purpose in the carrier's mind. As in Telegraph Co. v. Speight and in Mo. P. R. Co. v. Stroud, supra, it should depend upon the fact, upon whether a state line is crossed. If the purpose is evasion of state law, of what sign ficance is that? As the zone of state law is passed the zone of federal law is entered. There is no "no man's land" between these zones where lawlessness obtains.

My colleague forcibly says that there is danger "that what is in true essence intra-state commerce can be taken

away merely through the subterfuge of darting across a state line and back again." But the evidence in this case does not disclose a mere darting across a state line and back again. It does not record a single instance of that kind. And if it did, it would not be in its "essence" intra-state commerce, if the movement is a single movement. How can any movement be wholly intra (within a) state which crosses a state line?

2. Defendants have asked leave to file a counterclaim. The plaintiff, it is alleged, owes the state fees for the use of the highways which fees it has not paid. It is sought to recover them by this counterclaim. There are two reasons why I think the counterclaim should not be permitted to [fol. 104] be filed, although I have little doubt that the fees sought are owing.

Equity Rule 30 authorizes (1) a "counterclaim arising out of the transaction which is the subject matter of the suit." Also it authorizes (2) a "counterclaim against the plaintiff which might be the subject of an independent suit in equity against him." Two classes of counterclaims are thus provided for. Moore v. Cotton Exchange Co., 270 U. S. 593. But obviously the counterclaim sought to be asserted here does not fall in class (2); it could not be made the subject of an independent suit in equity. (It might be made the subject of a suit at law.) Does it arise out of the transaction which is the subject matter of the suit?

It is said in the opinion of the majority that it is doubtful if this counterclaim "arose out of the transaction which is the subject matter of the suit." I should go further in the same direction and say that it is certain the counterclaim does not arise out of the same transaction. What was "the transaction" which is the subject matter of this suit?

The Public Service Commission revoked or threatened to revoke the plaintiff's interstate permit and threatened then to prevent plaintiff operating without an interstate permit. The suit arises out of the withdrawal or threatened withdrawal of the permit and consequence incident to that withdrawal. The right to fees arises out of the use of the state's [fol. 105] highways by plaintiff. Certainly the (a) withdrawal of the right to use the highways and (b) the use of the highways are not the same thing, not the same transaction. They are scarcely comparable but, if comparable, they are not comparable as resembling one another but as opposites.

It is true that the plaintiff is operating under our temporary injunction. Because he is operating he owes fees. It may be said then that the counterclaim arises because of the injunction and that the injunction arose from the threatened withdrawal of the interstate permit. That, however, is a connection quite remote between counterclaim and "transaction" and not the immediate connection which the rule requires.

My second reason for believing this counter claim should not be entertained is this. If plaintiff owes fees for the use of the highways of the state he owes them to the state or to the state treasurer for the state. Sec. 5275, R. S. Mo. 1929. He does not owe them to the Public Service Commission whose members are the defendants in this case. Nor have I found any statute authorizing the Commission to sue for such fees as the agent of the state.

3. In my view a permanent injunction should issue and leave to file the counterclaim should be denied.

[fol. 106] IN UNITED STATES DISTRICT COURT

PETITION OF PLAINTIFF FOR REHEARING—Filed April 21, 1938

Now comes Frank Eichholz, plaintiff in the above-entitled cause, and respectfully prays that said cause be reheard and reconsidered, for the following reasons:

1. Because there is no evidence in the case from which the court could find that the carriage of property between St. Louis, Missouri, and Kansas City, Missouri, by way of its terminal in Kansas City, Kansas, is not the normal, regular or usual route for transporting such merchandise, in the face of the undisputed evidence in the record that the only terminals, depots, or other facilities for checking, weighing, inspecting, loading, unloading, or otherwise clearing shipments in question which plaintiff now has or ever had are located respectively in St. Louis, Missouri, and Kansas City, Kansas.

2. Because the order of the Public Service Commission revoking plaintiff's interstate permit prohibits the transaction of 90 percent of his total business from his St. Louis, Missouri, terminal which is concededly interstate commerce, and amounts to a prohibition of interstate commerce and

lays an undue burden thereon in violation of Sec. 8, Art. I of the Constitution of the United States.

3. Because the court erred in its conclusion of law that the plaintiff has no right to challenge the constitutional validity of Rule Number 44 promulgated by the Public Service Commission, since said rule, as interpreted by this court, results in conferring upon the Public Service Commission power and authority to prohibit interstate commerce, in violation of Sec. 8, Art. I of the Constitution of the United [fol. 107] States, and in violation of Sec. I of the Fourteenth Amendment to said Constitution.

4. Because the court erred in finding of fact #10, insofar as it infers that plaintiff voluntarily agreed to the revocation of his permit for acts performed in good faith and growing out of circumstances justiciable in their nature. Such a condition places the burden upon plaintiff to decide, at his peril, such judicial points and questions as are involved in this action.

5. Because the court erred in its conclusion of law that the act of the Public Service Commission in cancelling and revoking plaintiff's permit as an interstate carrier was a valid and constitutional exercise of its power, since the result of such conclusion would be to confer power upon said Commission to prohibit all interstate commerce by plaintiff contrary to Sec. 8, Art. I of the Federal Constitution, and in violation of his rights under the Sec. I of the 14th Amendment to Constitution.

6. Because the court erred in its conclusion of law that the plaintiff has violated the express terms of its interstate permit, since under Sec. 8, Art. I of the Federal Constitution, the Public Service Commission is without power to prohibit all interstate commerce by plaintiff, because of alleged violations.

7. Because, in its conclusion of law respecting any indebtedness for license fees or other charges due from this plaintiff to the State of Missouri, the court erred in the following respects:

[fol. 108] (a) Such conclusion must necessarily be predicated upon the premise that in an independent action for the recovery of such fees and charges, defendants are the

proper parties plaintiff; whereas under Laws of Missouri, 1931, p. 313, sec. 5272(d), such cause of action can be maintained only at the relation of the State Treasurer of the State of Missouri.

(b) The counterclaim fails in every respect to conform to the nature of counterclaims permissible under Federal Equity Rule No. 30.

(c) The record fails to show a ruling upon the objection of plaintiff to filing of the proffered counterclaim, but shows only that same was deposited with the Clerk with reservation of a ruling upon the propriety of filing same.

(d) The Laws of Missouri, 1931, p. 311, sec. 5272(a) are such as substantially make the issuance of a permit a condition precedent to collection of such fees and charges.

8. Because the court erred in finding as a fact that fees and other charges for the use of the highways of Missouri have accumulated and not been paid by plaintiff, in the face of the statutory provisions making the issuance of a license substantially a condition precedent to the payment of any such fees or charges.

9. Because the evidence does not tend to show that a "considerable portion" of the operations carried on by plaintiff are in hauling merchandise between St. Louis, Missouri, and Kansas City, Missouri, and that "much" of such shipments are in carload lots, and that, in such cases, all that is done at the Kansas City, Kansas, terminal is to change drivers, or, in some instances, the tractor, before [fol. 109] returning the merchandise to Kansas City, Missouri. On the contrary, the evidence shows that, from the nature of plaintiff's business, entry into the terminal at Kansas City, Kansas, was necessary in order to perform the essential transactions of checking, weighing, inspecting, making C.O.D. collections, and otherwise clearing shipments before delivery to the ultimate consignee.

10. Because there is no evidence in the case from which the court could find that only a negligible percentage of the shipments between Missouri points is unloaded at the Kansas City, Kansas terminal and then distributed to the consignee in Kansas City, Missouri. On the contrary, the uncontroverted evidence on this point was that only an

occasional shipment consigned to a point in Missouri was not unloaded at the terminal.

11. Because the evidence does not tend to show that the method of operation employed by the plaintiff is designed and intended to afford shippers the benefit of a lower rate, and because there is no evidence from which the court could find that the transportation service rendered by plaintiff between St. Louis, Missouri, and Kansas City, Kansas, is not in good faith.

12. Because there is no evidence in the case from which the court could find that the same trafficways used by plaintiff's trucks in transporting merchandise between its terminals in St. Louis, Missouri, and Kansas City, Kansas, are always used in making pickups from and deliveries into Kansas City, Missouri, in the face of evidence which shows that trafficways or streets thus used depended upon the ultimate destination of particular shipments in Missouri.

[fol. 110] 13. Because the evidence does not tend to show that, after reaching its terminal in Kansas City, Kansas, plaintiff "in many instances" does not unload the merchandise, but uses the same trailer employed in making the carriage from St. Louis, and hauls said property back over the identical route used in going to his terminal in Kansas City, Kansas, in making deliveries in Kansas City, Missouri.

The foregoing are some of the errors of fact and law into which the court has been led in its consideration of this case. Not only will these errors be plainly apparent upon a further consideration of the case, but such a reconsideration will show that the facts as they actually exist afford no basis for any such application of the law as that made by the court.

Petitioner prays, for the reasons herein set forth, that the decree of the court be withheld, and the cause reheard and reconsidered.

Respectfully submitted, D. D. McDonald, Frank E. Atwood, Smith B. Atwood, Counsel for Petitioner.

We hereby certify that the foregoing petition is, in our opinion, well founded in law and should be granted, and is not interposed for delay.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood, Counsel for Petitioner.

[fol. 111] IN UNITED STATES DISTRICT COURT

ORDER DENYING PETITION FOR REHEARING—Filed May 10, 1938

Petition denied and exception asked and allowed this 9th day of May, 1938.

Kimbrough Stone, Circuit Judge. Albert L. Reeves, District Judge. Merrill E. Otis, District Judge.

[fol. 112] IN UNITED STATES DISTRICT COURT

DECREE—Filed May 10, 1938

This cause came on to be further heard. This time on the merits of the case. The plaintiff appeared in person and by counsel, and the defendants appeared by counsel. Evidence for plaintiff and defendants was adduced upon the issues made by the pleadings, and the cause was argued by counsel.

Thereupon the said cause was taken under advisement by the court, and briefs were submitted to aid the court in the consideration thereof; and thereupon, and upon consideration thereof, it is Ordered, Adjudged, and Decreed by the court as follows:

That the plaintiff is not entitled to a permanent injunction against the defendants;

That the defendants validly revoked the permit heretofore granted to the plaintiff as an interstate carrier over the highways of the State of Missouri;

That the temporary injunction heretofore granted to the plaintiff by this court against the defendants should be, and the same hereby is dissolved;

That the defendants are entitled to recover on their counterclaim from the plaintiff on behalf of the State of Missouri certain license fees and other charges accruing during the pendency of this suit and the effective period of the temporary injunction; and,

That Jay M. Lee . . . , Esq., of Kansas City, Missouri, be, and he hereby is appointed as special master to take an accounting of such accrued and accumulating license fees [fol. 113] and other legal charges, if any, and report same to this court with his findings of fact and conclusions of

law. And the court hereby reserves jurisdiction of the cause till all questions arising on the counterclaim have been determined.

Done at Kansas City, Missouri, this 9th day of May, 1938.

Kimbrough Stone, Senior United States Circuit Judge. Albert L. Reeves, United States District Judge. Merrill E. Otis, United States District Judge.

[fol. 114] In United States District Court

Petition for Appeal—Filed July 11, 1938

The Plaintiff, Frank Eichholz, conceiving himself aggrieved by the Order and Decree made and entered on the 10th day of May, 1938, in the above entitled cause, dissolving the temporary injunction, refusing the permanent injunction, and appointing a special master to determine the amount of fees payable under the counterclaim, does hereby appeal therefrom to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors which is filed herewith, and he prays that this appeal may be allowed; that a citation be issued directly to the above named defendants, commanding them and each of them to appear before the Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises; and that a transcript of the record, proceedings and papers upon which said order and decree were made, be duly authenticated and sent to the Supreme Court of the United States.

Petitioner further prays that the amount of surety required of him on this appeal may be fixed by the order allowing this appeal.

Frank E. Eichholz, Plaintiff; D. D. McDonald, Frank E. Atwood, Smith B. Atwood, Counsel for Plaintiff.

[fol. 115] In United States District Court

Plaintiff's Assignment of Errors—Filed July 11, 1938

Now comes Frank Eichholz, plaintiff herein, by his counsel, and, having prayed an appeal from the decree entered

in this cause on the 10th day of May, 1938, dissolving the temporary injunction, refusing the permanent injunction, and appointing a master to determine the amount of fees payable under the counterclaim, petition for re-hearing having been denied, respectfully shows that said decree is erroneous and should be reversed and set aside for the following reasons:

1. The court erred in its conclusion of law that the act of the Public Service Commission of Missouri, in cancelling and revoking plaintiff's permit as an interstate carrier was a valid and constitutional exercise of its powers.

2. The court erred in not finding as a conclusion of law that the transportation of freight from Kansas City, Missouri to St. Louis, Missouri, through plaintiff's terminals or depots in Kansas City, Kansas, and from St. Louis, Missouri to Kansas City, Missouri through plaintiff's terminals [fol. 116] or depots in Kansas City, Kansas, is transportation in interstate commerce within the definition of that term as found in the Motor Carrier Act of Congress, 1935, Sec. 203(a) (10).

3. The court erred in construing Rule 44 of the Public Service Commission of Missouri to apply to transportation of freight between Kansas City, Missouri, and St. Louis, Missouri, by way of plaintiff's terminal in Kansas City, Kansas.

4. The court erred in applying an express or implied definition of "interstate commerce" in Rule 44 of the Public Service Commission which conflicts with the definition of that term as found in the Motor Carriers Act of 1935, thus and thereby depriving plaintiff entirely of his right to engage in transportation of freight in interstate commerce over the highways of Missouri.

5. The court erred in finding that the method of operation employed by the plaintiff was designed and intended to afford shippers the benefit of a lower rate and that the transportation service rendered by him between St. Louis, Missouri and Kansas City, Kansas was not in good faith.

6. The court erred in failing to find as a material fact that plaintiff's entire business was set up and organized with the design, intent and purpose of engaging solely in interstate commerce, and that his terminal depot in the Kansas

City area was located in Kansas City, Kansas, before there was a lawfully established rate differential between interstate commerce and intrastate commerce.

7. The court erred in finding that a "considerable" portion of plaintiff's business was hauling property or merchandise between St. Louis, Missouri, and Kansas City, Missouri, and erred in failing to find as a material fact that by far the greater bulk (more than 90%) of the total freight carried by plaintiff was indisputably transported in interstate commerce between the States of Missouri, Kansas, [fol. 117] Iowa and Illinois, to transport which it was necessary to cross some parts of the territorial boundaries of Missouri.

8. The court erred in failing to find as a material fact that, as to the relatively small portion of plaintiff's freight claimed to be intrastate in character, it was necessary for plaintiff first to traverse the entire distance between his terminals or depots in Kansas City, Kansas and St. Louis, Missouri, in order to perform the necessary functions of weighing, loading, unloading, making out freight bills, checking, inspecting, making C. O. D. collections, relieving drivers, exchanging tractors and trailors, etc., prior to delivery to the consignee, having no facilities in Kansas City, Missouri for performing such functions.

9. The court erred in finding that the carriage of property from St. Louis, Missouri, to Kansas City, Kansas, and thence back into Kansas City, Missouri, for delivery was not the normal, regular or usual route (for plaintiff) in shipping merchandise between St. Louis, Missouri and Kansas City, Missouri.

10. The court erred in finding as a material fact in the case that the terminal or depot used by the plaintiff in Kansas City, Kansas, was approximately one-half mile from the Missouri State Line by a used traffic-way between Kansas City, Missouri and Kansas City, Kansas.

11. The court erred in finding as a material fact in the case that the route used by the plaintiff from St. Louis, Missouri, to his depot or terminal in Kansas City, Kansas, was through Kansas City, Missouri, and that the same traffic-ways were used in making deliveries of merchandise or property after same had been hauled in the first instance

to the terminal in Kansas City, Kansas, and that such deliveries involved a retracing in part of the identical route.

12. The court erred in finding as a material fact in the case that after reaching the terminal or depot in Kansas City, Kansas, plaintiff in many instances did not unload the merchandise, but used the same trailer employed in making [fol. 118] the carriage from St. Louis, and hauled said property back over the identical route used in going to his depot in Kansas City, Kansas, in making delivery in Kansas City, Missouri, and North Kansas City, Missouri.

13. The court erred in finding as material facts in the case that much of plaintiff's shipments were in carload lots, and that the method employed by him was to haul such merchandise or property to his depot or terminal in Kansas City, Kansas, where a new driver, either with the same tractor and trailor or with another tractor and the same trailor, would return the merchandise to Kansas City, Missouri.

14. The court erred in finding that the merchandise or property shipped between St. Louis, Missouri, and Kansas City, Missouri, that was actually unloaded at the depot in Kansas City, Kansas, constituted only a negligible percentage of plaintiff's shipments between Missouri points.

15. The court erred in finding as a material fact in the case that prior to April 1, 1936, deliveries from the Kansas City, Kansas, depot to points in Missouri were made by an independent agency, but that subsequent to said date, such deliveries were made by plaintiff and are now being made by him.

16. The court erred in finding as a material fact in the case that the rates for interstate carriage between St. Louis, Missouri, and Kansas City, Kansas, were much lower than intrastate transportation tariffs between St. Louis, Missouri, and Kansas City, Missouri, and that the expense of delivery from the Kansas City, Kansas depot was not as great as the difference in tariffs.

17. The court erred in not concluding, as a matter of law, (it appearing indisputably in evidence that in transporting the freight in controversy the plaintiff crossed state lines,) that such operations were interstate in character, within the purview and definition of the Motor Carrier Act, 1935.

18. The court erred in finding that plaintiff's acceptance of an interstate permit on conditions prohibiting him from [fols. 119-153] hauling merchandise between points in Missouri was voluntary, in-so-far as said fact infers that plaintiff voluntarily agreed to the revocation of his interstate permit for acts complained of in this cause.

19. The court erred in concluding as a matter of law that plaintiff has no right to challenge the constitutionality of Rule No. 44, promulgated by the Public Service Commission.

20. The court erred in its conclusion of law that plaintiff had violated the express terms of his interstate permit.

21. The court erred in not concluding as a matter of law that the counterclaim filed in this cause did not comply with Equity Rule No. 30, in that it does not arise out of the transaction which is the subject matter of the suit, and did not set up any claim against plaintiff which could be the subject of an independent suit in equity by any of the defendants.

22. The court erred in failing to conclude as a matter of law that, under the provisions of Section 5272(a) Laws of Missouri, 1931, Page 311, only the State Treasurer of Missouri is authorized to maintain an action for the recovery of license fees and charges due from, and remaining unpaid by, a holder of an interstate permit to engage in interstate commerce.

Wherefore, and in order that the foregoing Assignment of Errors may be and appear of record in this cause, Frank Eichholz, plaintiff herein, presents the same to this court, and prays that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided; and plaintiff further prays that said final decree may be reversed and the court be directed to enter a decree in this cause in conformity with the prayer of the bill of complaint.

D. D. McDonald. Frank E. Atwood. Smith B. Atwood.

Dated at Jefferson City, Mo., this the 11th day of July, 1938.

[fol. 154] In United States District Court, Central Division of the Western District of Missouri

In Equity. No. 660

Frank Eichholz, Plaintiff,

vs.

Public Service Commission of the State of Missouri, Roy McKittrick, Attorney-General of the State of Missouri, and B. M. Casteel, Superintendent, State Highway Patrol, Defendants.

Order Allowing Appeal—Filed July 11, 1938

Plaintiff's petition for appeal filed herein having been taken up and considered, the court hereby orders that the same be allowed as prayed upon the filing of a bond in the amount of $500.00 with approved surety.

Kimbrough Stone, U. S. Circuit Judge. Albert L. Reeves, U. S. District Judge. Merrill E. Otis, U. S. District Judge.

[fols. 155-156] In United States District Court

Order Approving Appeal Bond—Filed July 16, 1938

Now on this 16th day of July, 1938, is filed for record herein the appeal bond in the above entitled cause in the sum of Five Hundred ($500.00) Dollars, with the National Surety Corporation, a corporation as surety.

The above bond approved this 15th day of July, 1938.

Merrill E. Otis, Judge.

[fol. 157] In United States District Court

Motion for Order Approving Statement of Evidence—Filed August 3, 1938

Comes now, Frank Eichholz, plaintiff and appellant in this cause and shows to the court that at the time of the filing of his precipe herein under Equity Rule No. 75(a), namely, on July 11, 1938, he filed also his statement of the evidence to be included in the record herein, a copy of which

was served upon appellees as shown by their acknowledgment of service upon the original copy so filed.

That he has notified appellees of such lodgment, as shown by acknowledgment of service, a copy of which is attached to this motion, and that on the 13th day of August, 1938 at 10:00 A. M. or as soon thereafter as the same may be heard, appellant will present said statement for approval in open Court in Kansas City, Missouri, where and when they may present any objections, or proposed amendments thereto.

Wherefore, appellant moves the court to make an order approving his said statement, if the same be true, and if the same be not true, to give such directions as the court may seem proper in order to make it so, and approve the same, and make it a part of the record for the purposes of this appeal.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood,
Solicitors for Appellant.

Service of the within Motion is hereby acknowledged, this the 3rd day of August, 1938.

James H. Linton, Daniel C. Rogers, Solicitors for Appellees.

[fol. 158] In United States District Court

Notice

Pursuant to Equity Rule 75(b) you are hereby notified that a statement of the evidence to be included in this case was filed by appellant with the clerk of this court on July 11, 1938, a copy of which statement has heretofore been served upon you as shown by your acknowledgment of service upon the original copy so filed.

Pursuant further to said Equity Rule 75(b) you are hereby notified that on Saturday, August 13, 1938, at 10:00 A. M. or as soon thereafter as the same may be heard, appellant will present said statement to this court for approval in open Court at Kansas City, Missouri, when and where you may present any objections or proposed amendments thereto; otherwise appellant will then and there move the court to approve said statement as filed and order the

same to become a part of the record for the purpose of the appeal herein.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood, Solicitors for Appellant.

Service of the within notice is hereby acknowledged this 3rd day of August, 1938.

James H. Linton, Daniel C. Rogers, Solicitors for Appellees.

[fol. 159] In United States District Court

Statement of the Evidence, With Acknowledgment of Service by Appellees—Filed July 12, 1938

Frank Eichholz, the plaintiff and appellant in this case, is engaged in the trucking business under the name of Riteway Motor Service. He has been in this business since about 1931, at which time no certificate or permit was required of motor carriers in Missouri. In 1932 he obtained an interstate contract hauler's permit from the Public Service Commission, pursuant to a statute then recently enacted, and operated under such permit until 1934. In 1934, upon application of appellant, his contract hauler permit was cancelled, and an interstate permit was issued in lieu thereof by the Public Service Commission, authorizing him to engage in interstate operations "from all points in Missouri to points beyond the State and from points beyond Missouri to all points within the State." He has never obtained or sought an intrastate permit from the Commission.

As a necessary part of such trucking business, appellant has established and still maintains terminals or depots at St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa and Burlington, Iowa. Between these terminals or depots he operates about 30 line-haul or road [fol. 160] trucks, of the tractor-trailer type having about a ten ton capacity. At each of these terminals appellant provides a "pick-up" and "delivery" service to his customers located within a 25 mile radius of the terminal. Shipments of goods are brought to the terminals on small trucks having a maximum capacity of two or three tons. Employees at the terminal unload this freight on the terminal docks, check, sort and classify it for shipment and load it on the large

line-haul or road trucks for transportation to another terminal. Bills of lading and freight bills are made out at the terminal offices. The loaded trucks are then weighed and placed in charge of special road drivers whose sole duty is to drive the road trucks between terminals. This transportation is accomplished at night, the trucks reaching the terminal of destination early in the morning. When the loaded trucks reach the terminal, the road driver is relieved and the truck is turned over to the terminal employees, who overhaul and service the truck, unload the shipment, sort and classify the freight according to its further disposition. Some of the freight may be destined to another terminal, some of it may be destined to a point which is not on appellant's line, in which case it will be handled by some "inter-line carrier" making connection with the appellant at the terminal, and some of the freight may be destined to points within the 25 mile radius of the terminal covered by the "delivery service." Occasionally, a shipment destined to a point within the 25 mile radius of the terminal constitutes all or a large part of the truck load. In that event, after the truck and load has been checked at the terminal, the road driver relieved, and the shipment otherwise cleared at the terminal, the truck load is later delivered to consignee's door, by the "delivery service" driver. Such a shipment is never delivered by the "road-driver" direct to the consignee, but must always pass through and be dealt with at the terminal, and is delivered by the "delivery service" driver to the consignee's dock.

One of appellant's terminals is located in Kansas City, Kansas, about one-half mile from the Missouri-Kansas line. It was so situated at the solicitation of the owner of the [fol. 161] property in 1932 at a time when appellant was just beginning to operate as a motor carrier. It is a large building with convenient facilities for loading and unloading trucks, parking trucks, handling freight and otherwise transacting a trucking business. At the time when the terminal was located, several other motor carriers were also using the site as a terminal. These were non-competing carriers and none of them competed with appellant. For this reason it was convenient for them to use the same terminal facilities and to establish inter-line connections for the transportation of freight. This terminal is located in close proximity to many large shippers who ship freight

by truck. It is the only terminal which the appellant has ever had in this area. This terminal was located prior to the promulgation by any legal authority of tariffs affecting either interstate or intrastate carriage of property. At the time of this action, published tariff rates disclosed a differential in favor of interstate rates.

From the time of locating the terminal at Kansas City, Kansas, until the early part of 1936 the "pick-up" and "delivery" service in that area was conducted by the Mid-Central terminal, the owner and operator of the premises, under a contractual arrangement with the appellant. All matters pertaining to billing, checking, loading and unloading, weighing, classifying, making pick-ups and deliveries, making inter-line arrangements and making collections were handled by the Mid-Central terminal under said contractual arrangements. No permit was ever obtained by the operator of the Mid-Central terminal, and under the law none was necessary. Under this arrangement shipments were billed from the consignor to the Mid-Central terminal or to the consignee in care of the Mid-Central terminal and then re-billed to the consignee from the Mid-Central terminal. Since the early part of 1936 the Mid-Central terminal has been employed by the appellant as his agent to perform the pick-up and delivery service in the Kansas City, Kansas, area. Under this arrangement shipments are billed to the consignee with a designation on the bill of lading that they are to be transported by way of the Kansas City, Kansas, terminal. The nature and character of this [fol. 162] "pick-up" and "delivery" service are described in the tariffs on file with the Interstate Commerce Commission.

Since the 25 mile radius of the Kansas City, Kansas, terminal necessarily includes a large part of Kansas City, Missouri, appellant carries some shipments from consignors in St. Louis, Missouri, to consignees in Kansas City, Missouri, and from consignors in Kansas City, Missouri, to consignees in St. Louis, Missouri, both by way of the terminal in Kansas City, Kansas, through which such freight must pass for the purpose of performing the functions of checking, weighing, etc., heretofore described. According to the evidence for the appellant this type of transaction constitutes approximately 10% of his total business. According to the evidence for the appellees it constitutes approximately 40 % of the business carried on between the St. Louis, Missouri, and Kansas City, Kansas, terminals.

An investigation to determine whether the appellant was engaging in intrastate commerce contrary to the terms of his interstate permit was closed by final order of the Public Service Commission on July 15, 1935. His interstate permit was revoked by the Public Service Commission by order effective December 31, 1936, upon the alleged ground that his operations between St. Louis, Missouri, and Kansas City, Missouri, by way of his terminals as above described were intrastate in character, and were in violation of his interstate permit. Until the revocation of his permit appellant had paid all of the fees required by the state for the use of the roads. Since that time a tender of the fees was made, but the Public Service Commission refused such tender. Consequently, no fees have been paid since the revocation of appellant's permit. Investigation of appellant's trucks by State officials have continued since the institution of this suit, but no arrests were made because of the pendency of the temporary injunction.

Appellant has filed an application with the Interstate Commerce Commission in compliance with the terms of the Motor Carriers Act of 1935, for a certificate of convenience and necessity, to permit him to continue, under the provisions of section 206 of that act to operate in interstate commerce. This application is still pending and undetermined by that commission.

[fol. 163] Respectfully submitted, D. D. McDonald, Frank E. Atwood, Smith B. Atwood, Counsel for Appellant.

Service of the above Statement of the Evidence is hereby acknowledged this 12th day of July, 1938.

James H. Linton, Daniel C. Rogers, Attorneys for Defendants, Public Service Commission, Roy McKittrick, Attorney General and B. M. Casteel, Superintendent of the State Highway Patrol.

Approved, Merrill E. Otis, Judge.

[fol. 164] In United States District Court

Appellees' Amended Statement of the Evidence—Filed August 11, 1938

Without abandoning their position that the only question preserved in the appeal for determination by the Supreme

Court of the United States is the constitutionality of Rule No. 44, and that the determination of the constitutionality of such rule would be a useless gesture because such determination is not dispositive of the case, appellees present this amendment to the statement of the evidence prepared by appellant.

If the Supreme Court of the United States should take jurisdiction of the appeal for the purpose of determining the character of the commerce, which appellees contend has not been preserved in the appeal, the evidence prepared by appellant should be considered as amended and supplemented by the following statement:

[fol. 165] The Act of the Missouri General Assembly involved in this case is the one known as the Missouri Bus and Truck Law, found on pages 304-316, inclusive, Laws of Missouri, 1931.

Under the provisions of Section 5268-(b) and (d) of this Act appellant made application for and was duly granted an interstate common carrier permit to operate over irregular routes in the State of Missouri on November 23, 1934. The essential provisions of said interstate permit are as follows:

"For authority to operate interstate as a freight carrying motor carrier over an irregular route as follows: From all points in Missouri to points beyond the State and from points beyond Missouri to all points within the State, exclusively in interstate commerce."

Appellant, during the period of his disputed operations, has operated approximately seventy pieces of motor equipment between his various termini and has made approximately one hundred thirty truck trips per month between his terminal in St. Louis, Missouri, and his terminal in Kansas City, Kansas, using U. S. Highway No. 40 from St. Louis, Missouri, to Kansas City, Missouri, and thence over city streets to his terminal in Kansas City, Kansas. The terminal in Kansas City, Kansas is located at a distance of less than one half mile from the Missouri state line. On these trips appellant hauled freight originating in St. Louis, Missouri and destined to Kansas City, Missouri, and vice versa, through the terminal in Kansas City, Kansas.

The Supervisor of the Bus and Truck Department of the Missouri Public Service Commission had conducted investigations of appellant's operations for a period of more than one year preceding the revocation of appellant's authority. He was familiar with the exhibits which appellant had in- [fol. 166] troduced in a hearing before an Examiner of the Interstate Commerce Commission, tending to prove movements of freight between St. Louis, Missouri and Kansas City, Missouri. He testified that not less than forty per cent of the freight moving over U. S. Highway No. 40 originated at and was destined to one or the other of the two Missouri cities aforesaid.

At the time of the revocation of appellant's interstate permit by the Missouri Public Service Commission, which became effective on December 31, 1936, appellant was carrying freight on an interstate first class freight rate of sixty cents per CWT between St. Louis, Missouri and Kansas City, Missouri, and vice versa, through the terminal at Kansas City, Kansas. The similar intrastate freight rate established by the Missouri Public Service Commission was ninety-two cents per CWT. Numerous intrastate operators were operating between St. Louis, Missouri and Kansas City, Missouri over U. S. Highway No. 40 and were bound by the ninety-two cent first class intrastate freight rate. Similar differentials in favor of interstate commerce existed on other classes of freight hauled by appellant. His interstate freight tariff quoting interstate rates between the two Missouri cities aforementioned was filed with the Interstate Commerce Commission on April 1, 1936.

In its order of revocation of appellant's interstate permit, which order was introduced in evidence by the appellant himself, the Public Service Commission of Missouri consumed approximately fifteen typewritten pages in discussing the character of the commerce which appellant had been engaged in hauling between the two Missouri cities mentioned. Therein the Missouri Commission stated that [fol. 167] the controlling question for determination was the character of the commerce, and concluded that appellant had

"• • • resorted to shams, devices and subterfuges which merely give the color of interstate commerce to his transactions; that he has unlawfully sought thereby to exer-

cise valuable rights and privileges never acquired, and to evade regulation by the State of Missouri."

There was introduced in evidence before the three-judge court a transcript of the evidence taken before the Public Service Commission and upon which the order of revocation of the Public Service Commission was based. This transcript, consisting of three hundred thirty-two pages, was principally the testimony of shipper witnesses from St. Louis and Kansas City, summoned by the Public Service Commission to describe the character of the commerce transported between the two Missouri cities mentioned.

A number of those witnesses testified that they did not know until the day of the hearing that their freight was handled through a terminal at Kansas City, Kansas and that they did not direct the appellant as to the routing. They testified that appellant's solicitors encouraged them to use his trucks between the two Missouri cities because of his substantially cheaper interstate freight rates.

In a few sentences the Missouri Commission also decided that appellant had been engaged in the violation of Rule No. 44 promulgated by it.

Additional evidence before the three-judge court tended to prove that large quantities of freight originating in St. Louis, Missouri were billed to the terminal in Kansas City, Kansas, as consignee. Thereafter, billing instructions were given to the terminal for transportation of the freight to consignees in Kansas City, Missouri. The operator of the [fol. 168] terminal testified that these were designated as "pool" or "blanket" shipments. He also testified that individual shippers in St. Louis, Missouri consigned freight to his terminal in Kansas City, Kansas as consignee, which, afterwards, was by him re-billed and transported to the real consignee in Kansas City, Missouri upon instructions of the St. Louis, Missouri shipper. He testified that shipments between St. Louis, Missouri and destinations in Kansas or Colorado were not so handled. He testified that by far the majority of shipments originating in St. Louis, Missouri and destined to consignees in Kansas City, Missouri were handled in this manner. Full trailer loads of freight billed from a single consignor in St. Louis, Missouri to a single consignee in Kansas City, Missouri were driven through Kansas City, Missouri to the terminal in Kansas City, Kansas. Sometimes these full trailer loads were unloaded

at the terminal and thence transported back into Kansas City, Missouri by means of "delivery" trucks. The terminal had one "delivery" truck that was large enough to haul a full truckload off of any one of the road haul trucks. Sometimes these full trailer loads were driven immediately back into Missouri and unloaded at the docks of consignees. The terminal operator testified that such was the usual practice on full trailer loads.

On February 1, 1938, before the trial of this case on its merits, eight of appellant's westbound transport trucks passed over the scales of the Missouri State Highway Commission at a point on U. S. Highway No. 40, a short distance east of Kansas City, Missouri. According to the statements made by the drivers, six of the eight trucks were destined to the terminal in Kansas City, Kansas. Two were destined to Wichita, Kansas. Only one of the drivers of these eight trucks would show the inspector his freight bills. The other drivers declined to produce their freight bills for inspection. [fol. 169] The inspected truck carried a total of 16,900 pounds of freight originating in St. Louis, Missouri, destined to a consignee at North Kansas City, Missouri. It was driven through Kansas City, Missouri to the terminal in Kansas City, Kansas. The inspector personally saw that same trailer load of freight unloaded at docks of consignee in North Kansas City, Missouri a short while afterwards.

Also, on February 1, 1938, another inspector testified that a westbound truck of appellant was found to be carrying a trailer load of paper from a consignor in St. Louis, Missouri to a consignee in Kansas City, Missouri and that he followed that trailer across the Kansas line to the terminal and thence back into Kansas City, Missouri where it was unloaded at the docks of the consignee.

Appellant has applied to the Interstate Commerce Commission for authority to engage in interstate commerce over regular routes between the terminal of St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa and Burlington, Iowa. He makes an intensive use of several of the principal Missouri state highways in transporting freight between these several termini. Such application to

the Interstate Commerce Commission was heard by an Examiner during the month of July, 1937.

James H. Linton, General Counsel; Daniel C. Rogers, Assistant Counsel, Missouri Public Service Commission, Solicitors for Appellees.

Received a copy hereof this 10th day of August, 1938.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood, Solicitors for Appellant.

Approved by consent of parties this 13th of August, 1938. Merrill E. Otis, Judge.

[fol. 170] In United States District Court

Praecipe for Transcript of Record—Filed July 12, 1938

To A. L. Arnold, Clerk of the above Court:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers, to-wit:

1. Bill of Complaint filed December 31, 1936.
2. Notice of Application by Plaintiff for Temporary Restraining Order with acknowledgment of service thereon filed December 31, 1936.
3. Temporary Restraining Order together with return of service thereon filed January 5, 1937.
4. Separate Answer of Public Service Commission filed January 22, 1937.
5. Separate Answer of Roy McKittrick, Attorney-General of Missouri filed January 22, 1937.
6. Separate Answer of B. M. Casteel, Superintendent [fol. 171] Missouri State Highway Patrol, filed January 22, 1937.
7. Memorandum Opinion and Findings of Fact on Plaintiff's Application for a Temporary Injunction, together with signatures of judges thereto, filed February 3, 1937.
8. Order granting Temporary Injunction filed February 15, 1937.

9. Motion of Defendants to Dissolve Temporary Injunction together with notice of service thereon upon plaintiff, filed April 30, 1937.

10. Supplementary Answer in the Form of a Counterclaim deposited with the clerk February 2, 1938.

11. Memorandum Opinion by Reeves, J., filed March 24, 1938.

12. Separate Concurring Opinion of Stone, Cir. J., filed March 24, 1938.

13. Dissenting Opinion of Otis, J., filed March 24, 1938.

14. Petition for Re-hearing filed April 21, 1938.

15. Order denying petition for re-hearing entered May 10, 1938.

16. Decree denying permanent injunction and appointing Jay M. Lee as Special Master entered May 10, 1938.

17. Petition for Appeal.

18. Assignment of Errors and Prayer for Reversal.

19. Statement of basis on which appellant contends that the Supreme Court of the United States has appellate jurisdiction.

20. Order allowing the appeal.

20½. Order approving appeal bond.

21. Citation together with acknowledgment of service thereof by appellees.

22. Statement directing attention of appellees to Rule 12 (3) together with acknowledgment of service of such statement and copies of the petition for and order allowing the appeal, the Assignment of Errors, and Statement as to jurisdiction, by the appellees.

[fol. 172] 23. Statement of Evidence together with acknowledgment of service thereof by appellees.

24. This praecipe together with acknowledgment of service thereof by appellees.

You are requested to prepare this transcript as required by law and the rules of this court and the rules of the Supreme Court of the United States of America, and to file the same in the office of the Clerk of the United States Supreme Court in the city of Washington, D. C., on or before the 20th day of August, 1938, or at such later date as may

be designated in an order of this court enlarging and extending said time.

Dated this 12th day of July, 1938.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood, Counsel for Appellant.

Service of the above praecipe accepted and acknowledged this 12th day of July, 1938.

James H. Linton, Daniel C. Rogers, Attorneys for Defendants and Appellees.

[fol. 173] In United States District Court

Order Extending Time for Filing Transcript of Record—Filed August 13, 1938

For satisfactory reasons appearing to the Court the time for filing the record in this case in the Supreme Court of the United States of America, pursuant to the appeal allowed and the citation issued herein, is extended to the 19th day of September, 1938.

Merrill E. Otis, Judge.

[Fol. 174] Clerk's certificate to foregoing transcript omitted in printing.

[Fol. 175] In Supreme Court of the United States

Statement of Points of Reliance, and Designation of Necessary Parts of the Record—Filed September 24, 1938

Comes now appellant in this cause and hereby files his statement of the points on which he intends to reply in this appeal, as follows:

I

The order of the Public Service Commission of Missouri revoking its previously granted interstate permit upon the ground that certain of appellant's transactions of freight transportation were conceived by said Commission to be intrastate in character, is tantamount to an unconditional

denial of appellant's right to engage in other transactions which were admittedly interstate in character. This order was therefore void and of no force or effect.

II

In so revoking its interstate permit said Commission usurped the field of congressional authority, and unlawfully deprived appellant of his rights and property without due [fol. 176] process of law which are guaranteed both by the state and federal constitutions.

III

The transactions of freight transportation of which the Public Service Commission of Missouri complains are characterized as "interstate commerce" in the definition of that term as found in the Motor Carriers Act of 1935, notwithstanding a contrary definition inferred from said commission's Rule 44, or otherwise (U. S. C. A. Title 49, section 303(a)-(10)). The right to engage in such commerce is not derived from the state of Missouri, and it cannot therefore be unconditionally denied by that state or any of its agencies upon any grounds.

IV

The District Court erroneously adopted the Public Service Commission's characterization of said freight carriage transactions as intra-state, viewing them in the light of that Commission's definition as derived from its Rule 44 and other considerations, ignored the congressional definition of "interstate commerce", refused to enjoin the void order of the Commission and thereby denied appellant the equal protection of the laws which is guaranteed both by the State and Federal constitutions.

V

Rule No. 44 of the Public Service Commission of Missouri should not be construed as applicable to the transactions of freight transportation of which said Commission complains. If, however, said rule is so construed as to render it applicable to said transactions it is unconstitutional and void because it is in direct conflict with the provisions of the Motor Carrier Act of 1935.

VI

Appellant can not be denied the right to challenge the validity of Rule No. 44 of the Public Service Commission [fols. 177-180] of Missouri because of the acceptance of an interstate permit which is so construed by the court as to impose invalid and unconstitutional conditions.

VII

The Public Service Commission of Missouri is devoid of any authority to maintain an action in its name to recover statutory fees alleged to be due the State for use of its highways. That right of action, if any, is reposed by statute in the Treasurer of the State of Missouri. (Sec. 5272(a), Laws of Missouri, 1931, page 311.) Absent the right to maintain such an action, the Commission could not maintain it in the form of a counterclaim in this suit. Furthermore, such a claim not being equitable in nature, could not be "the subject of an independent suit in equity" within the meaning of Equity Rule 30.

The District Court therefore erred in allowing recovery on appellee's counterclaim.

Appellant states that this is a suit in equity in which a counter-claim was filed and allowed, based upon facts not cognizable in an equitable action; that he believes all of the transcript of the record is necessary for a consideration of the above points, and he therefore requests that said record be printed in toto.

D. D. McDonald, Frank E. Atwood, Smith B. Atwood,
Counsel for Appellant.

Service of copy of the within document is hereby acknowledged this 22 day of Sept. 1938.

James H. Linton, Daniel C. Rogers, Attorneys for Appellees.

[fol. 181] [File endorsement omitted.]

Endorsed on cover: Enter Frank E. Atwood. File No. 42,852. W. Missouri D. C. U. S. Term No. 367. Frank Lichholz, appellant, vs. Public Service Commission of the State of Missouri, et al. Filed September 20, 1938. Term No. 367, O. T., 1938.

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Subject Index.

Table of Cases Cited.

Statutes Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS APPELLATE JURISDICTION HEREIN.

(Filed in United States District Court on July 11, 1938.)

Pursuant to Supreme Court Rule 12, par. 1, Frank Eichholz, appellant in this cause, files this, his statement showing the basis on which said appellant contends that the

Supreme Court has appellate jurisdiction to review the decree herein on appeal:

1. The statutes believed to sustain such appellate jurisdiction are U. S. C. A., Title 28, Sections 345 and 380.

2. The validity, interpretation and meaning of a rule of the Public Service Commission of Missouri, promulgated under a Missouri statute, and the validity, interpretation and meaning of a statute of the United States are involved herein, and are as follows:

(a) Rule No. 44 of the Public Service Commission of Missouri, as follows:

> "No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier accepts within Missouri a passenger whose destination is beyond the limits of the State, such passenger shall not be permitted to terminate his trip within the State of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri."

This rule was promulgated by authority of Section 5267 (b), Laws of Missouri, 1931, page 306, as follows:

> "The Public Service Commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined."

(b) Motor Carriers Act of 1935, Section 203 (a)-(10); U. S. C. A., Title 49, Section 303 (a)-(10), as follows:

> "The term 'interstate commerce' means commerce between any place in a state and any place in another

state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

It is the contention of appellant herein that the Public Service Commission rule, as interpreted and applied by the District Court to the facts in evidence, is in conflict with the definition of "interstate commerce" as that term is defined in the Motor Carrier's Act of 1935.

3. The decree appealed from was entered on the 10th day of May, 1938.

4. The application for appeal was presented on the 11th day of July, 1938.

5. (a) The nature of the case which brings it within the jurisdictional provisions relied on is as follows:

Prior to the entry of the decree from which this appeal is taken appellant transported freight by automobile trucks as a common carrier between his freight terminals or depots in St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa, under a permit to engage in interstate commerce issued by the Public Service Commission of Missouri. He was so engaged long before the effective date of the Federal Motor Carrier's Act of 1935. He filed his application with the Interstate Commerce Commission within the time and in accordance with the terms of the act for a certificate of convenience and necessity to engage exclusively in interstate commerce, which application has been heard but not finally passed upon. He has thus complied with the specific provisions of the act which entitle him to continue his operations until final action upon his application. He has also complied with all the rules and regulations over which the Public Service Commission of Missouri has jurisdiction,

and particularly with respect to the character of vehicles used, proper safety lights and equipment, and has furnished all kinds of insurance required.

The terminals or depots were located at the above named places, and appellant's business organization was accordingly established prior to the promulgation by any legal authority of tariffs governing interstate and intrastate carriage. At the time of this action published tariff rates disclosed a differential in favor of interstate rates. At each of his terminals or depots appellant renders to all his patrons a "pick-up" and "delivery" service within a radius of twenty-five miles of his terminals. In this area he "picks up" consignments of patrons, carries them to the terminal or depot of the area, unloads them on the dock there located, where they are later loaded on a line truck by which they are transported to some other of the terminals or depots. At the terminal of destination these consignments are unloaded from the line truck on to the dock or on to a delivery truck and, by means of the "delivery service" are carried to the places of business of the consignees. At the terminal of origin as well as at the terminal of destination certain functions in connection with shipments are performed, such as weighing, checking, inspecting, loading, unloading, making out freight bills, making C. O. D. collections, assigning and relieving line-truck drivers, changing tractors and trailers, etc. Full information of the nature and character of this "pick-up" and "delivery" service is on file with the Interstate Commerce Commission.

By far the greater portion (approximately 90%) of plaintiff's total business is indisputably interstate in character. A much smaller portion (approximately 10%) is in dispute as to its character. This arises from the fact that the area of "pick-up" and "delivery" service surrounding the Kansas City, Kansas, terminal necessarily extends into parts of Kansas City, Missouri. All consignments, however, from

the Kansas City, Kansas, terminal "pick-up" and "delivery" service area to the St. Louis, Missouri, area are transported in due and regular course of appellant's business (and necessarily are so transported) from appellant's terminal or depot in Kansas City, Kansas, to his terminal or depot in St. Louis, Missouri. So also as to consignments from the St. Louis area to the Kansas City, Kansas, area.

The Public Service Commission of Missouri, conceiving that the terms of its interstate permit were being violated by these transactions, cited appellant to appear and show cause why his interstate permit should not be revoked. At a hearing on this citation, the Commission entered an order revoking appellant's Missouri interstate permit. The rule alleged to have been violated is its Rule No. 44 which, as construed by the Commission, contained an absolute prohibition of the carriage of freight from consignors in Kansas City, Missouri, to consignees in St. Louis, Missouri, and from consignors in St. Louis, Missouri, to consignees in Kansas City, Missouri, even though the carriage be between terminals in St. Louis, Missouri, and Kansas City, Kansas.

Appellant in this action sought and obtained a temporary injunction restraining appellees from further proceedings to enforce the order. At the trial on the merits appellees offered a counterclaim based on the license fees and charges claimed to be due from appellant by reason of his operations under the temporary injunction, an action to recover which, under Missouri statutes, may be maintained only by the Treasurer of the State of Missouri. Bond had been given at the time of the granting of the temporary injunction upon approved conditions of payment of said fees and charges sought in the counterclaim. Trial resulted in dissolution of the temporary injunction, denial of the permanent injunction sought, admission of filing of the counterclaim, and a judgment upon the counterclaim in an amount to be ascertained from testimony later to be taken by a master ap-

pointed by the court for that purpose. One of the judges wrote a dissenting opinion.

(b) The rulings of the court which bring the case within the jurisdictional grounds relied on are:

In determining which, if any, of the acts of freight transportation between Kansas City, Missouri, and St. Louis, Missouri, and between St. Louis, Missouri, and Kansas City, Missouri, were intrastate in character (both being indisputably by way of Kansas City, Kansas) the court's rulings did not apply the Congressional definition of what constitutes interstate commerce as found in the Motor Carrier Act of 1935, Section 203 (a)-(10), but applied the inferential definition found in Rule 44 of the Public Service Commission in Missouri, thereby upholding the action of that commission.

The court's rulings ascribed motives of bad faith inferred solely from an existing differential between rates in favor of the interstate rate, and thereby made motive control the Congressional definition of the term "interstate commerce", contrary to its language.

The court's rulings, ignoring the reasons prompted by the business organization and set-up of appellant in the routing of the disputed freight by way of Kansas City, Kansas, ascribed motives of bad faith thereto inferred solely from a rate differential in favor of the interstate rate, thereby broadening and enlarging the reasonable purpose and intendment of the Public Service Commission's Rule No. 44 beyond its authoritative scope, and bringing it in conflict with the Motor Carrier Act, 1935.

Wherefore, the court's rulings impinged upon Section 8, Article 1 of the Federal Constitution in placing the power of the State above the power of the Federal Government in the regulation of commerce between the States; impinged upon appellant's rights, under Section 1 of the 14th Amend-

ment to the Federal Constitution which guarantee him due process of law and equal protection under the law.

6. The cases believed to sustain the jurisdiction are as follows:

Herkness v. *Irion*, 278 U. S. 92, 49 S. Ct. 40;
Oklahoma Gas Co. v. *Russell*, 261 U. S. 290, 43 S. Ct. 353;
Buck v. *Kuykendall*, 267 U. S. 307, 45 S. Ct. 324, 38 A. L. R. 286;
Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245, 48 S. Ct. 230;
Clark v. *Poor*, 274 U. S. 554, 47 S. Ct. 702.

Respectfully submitted,

D. D. McDonald,
Frank E. Atwood,
Smith B. Atwood,
Counsel for Appellant.

EXHIBIT "A".

Copies of Opinions Rendered in the Case.

* * * * * * *

The following Per Curiam opinion (omitting caption) was rendered on the hearing for temporary injunction:

Frank Eichholz, the plaintiff, is a common carrier of freight by automobile trucks, operating over established lines between terminal buildings belonging to him and located in St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. His contention is that he is engaged in interstate commerce only. On the theory that he proposed to and would engage only in interstate commerce in Missouri, he applied for and on November 23, 1934, was granted by the Public Service Commission an "interstate permit," authorizing him to operate over the highways of Missouri in interstate commerce. Subsequently, by an order effective December 30, 1936, the Public Service Commission revoked the permit granted in 1934. The defendants having threatened to cause the arrest of plaintiff's employees, operating his trucks, if they operate them after December 30, 1936, plaintiff filed his bill here, setting up *inter alia* the facts stated and praying injunctive relief. The question now to be determined is whether plaintiff shall have a temporary injunction restraining defendants from proceeding against plaintiff and his employees for operating plaintiff's trucks on the highways of Missouri.

Upon the question stated we have heard evidence (in the form of a transcript of the testimony taken by the Public Service Commission and in the form of affidavits), all of which, together with the allegations of the verified bill and the argument of counsel we have considered.

The theory upon which the plaintiff's permit was revoked (that theory is best presented in the report of the Public Service Commission accompanying its order of revocation) is that the plaintiff has abused its privileges under its per-

mit in that actually it has engaged in intrastate commerce, fraudulently undertaking to give to its intrastate commerce the appearance of interstate commerce by unnecessarily crossing a state line in the transportation of goods from one point in Missouri to another point in Missouri. This crossing of a state line, the Commission found, was a mere sham and pretext whereby plaintiff sought to avoid state supervision and to undercut intra-state freight rates.

In justice to the Public Service Commission it should be said that at the hearing before that body the plaintiff here put on no testimony. There the plaintiff maintained that, whatever is its motive in crossing a state line with goods being shipped from one point in Missouri to another point in Missouri and however artificial the crossing of the state line is, *if it does cross a state line* the commerce is interstate and not subject to state regulations. The evidence before us presents perhaps a truer picture of the nature of plaintiff's business than that which was considered by the Commission.

The essential facts, as they are disclosed at this stage of this proceeding, are these (and we find them to be the facts):

1. The plaintiff transports freight by automobile trucks as a common carrier between freight terminals or depots located in St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. By far the largest part of its business consists of the transportation of goods from points in one state to points in other states. A small percentage of its business (approximately 5%) consists in the transportation of goods from points in Missouri to other points in Missouri, chiefly from Kansas City, Missouri, to St. Louis, Missouri, and from St. Louis, Missouri, to Kansas City, Missouri.

2. At St. Louis, Missouri (and so also at each of the cities at which plaintiff has a terminal or depot) the plaintiff renders to its patrons a so-called "pick-up" service. This service it renders to all its patrons living within a circle having a radius of twenty-five miles, the center of which is at the plaintiff's terminal or depot. The plaintiff picks up at the place of business of a patron the consignment he de-

sires to have transported, carries that consignment to the terminal or depot, unloads it on a dock there situated, thence it is loaded on a line truck and by that line truck transported to some other of the plaintiff's terminals or depots. It is unloaded from the line truck at the terminal or depot of its destination. At that terminal or depot, as at each other of plaintiff's terminals or depots, a "delivery service" is rendered by plaintiff. Plaintiff causes the shipment to be loaded on to a delivery truck and by that truck carried to the place of business of the consignee. This "delivery service," like the "pick up" service, is rendered to patrons of the plaintiff living within a circle having a twenty-five mile radius, the center of which is the terminal or depot of the plaintiff. Since the St. Louis "pick up" service area of the plaintiff, the center of which is the St. Louis, Missouri, terminal of the plaintiff, necessarily includes a part of Missouri, and since the Kansas City, Kansas "delivery" area, the center of which is at the plaintiff's terminal in Kansas City, Kansas, necessarily also includes a part of Missouri, some consignments will be from consignors whose places of business are in Missouri to consignees whose places of business also are in Missouri. All consignments, however, from the St. Louis, Missouri "pick up" area to the Kansas City, Kansas, "delivery" area are transported in due and regular course of plaintiff's business (and necessarily are so transported) from plaintiff's terminal or depot in St. Louis, Missouri, to plaintiff's terminal or depot in Kansas City, Kansas. So also as to consignments from the Kansas City, Kansas, "pick up" area to the St. Louis, Missouri, "delivery" area.

3. Conforming with laws enacted by Congress plaintiff has filed with the Interstate Commerce Commission schedules of its rates for the transportation of freight and full information touching the points between which it carries freight, and in connection with each of these points a full statement as to the "pick up" and "delivery" service there rendered and the areas within which that service is rendered, all of which it is required to do by laws enacted by Congress. The plaintiff carries no freight except in accordance with its freight rates on file with the Interstate Com-

merce Commission. Plaintiff carries no freight between any points in Missouri save and except that which in the usual and regular course of its business it carries from a terminal in one state to a terminal in another state.

In view of what at the present stage of this proceeding we have found to be the facts (the final hearing may, of course, disclose entirely different facts) it is not necessary for us to inquire whether, if the plaintiff actually was engaged in what really is intra-state commerce, carrying goods from one point in Missouri to another point in Missouri, endeavoring by sham and subterfuge to make that business appear to be interstate commerce, it would be subject to regulation by the state. Upon the facts which have been found no question can be made but that all of the business carried on by plaintiff is interstate commerce and that there is present in plaintiff's plan of business no sham or subterfuge that might conceivably, when removed, be found to cover up what really is commerce intra-state.

A temporary injunction will issue. Counsel for plaintiff will submit to the court for approval and entry an appropriate decree and with it an appeal bond in the amount of $1,000 to secure the defendants against damage.

EXHIBIT "B".

On final hearing the opinion (omitting caption) of the court was rendered and filed by Reeves, J., which is as follows:

REEVES, *J.:*

This is a suit to enjoin the cancellation or revocation of a permit granted to plaintiff as an interstate motor carrier, and bearing date November 23, 1934. The order of revocation was made effective December 30, 1936. A temporary injunction was granted January 23, 1937, and the case was tried and submitted on final hearing February 2, 1938.

An order of a state administrative board being challenged, a three-judge court was constituted in conformity with Section 380, Title 28, U. S. C. A.

Section 5268 (b), Laws Missouri 1931, relating to Motor Vehicles, provides for the granting of permits by the Public Service Commission of the State of Missouri to motor carriers desiring "to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce * * *."

In accepting such permits the carriers become obligated to pay certain license fees at times and in accordance with schedules prescribed by law.

By Section 5269, Laws Missouri, 1931, supra, "The commission may at any time, for good cause, suspend, and upon at least ten days notice to the grantee of any certificate, and an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of this act."

The permit granted to the plaintiff by the Public Service Commission of Missouri authorized him to "operate interstate as a freight carrying motor carrier over an irregular route as follows: From all points in Missouri to points beyond the state and from points beyond Missouri to all points within the state, exclusively in interstate commerce."

At the time this permit was granted there was in effect a rule (having the force of law) promulgated by the Public Service Commission of Missouri as authorized by Statute, and known as Rule No. 44. By this rule the holders of interstate permits were forbidden to transport within the state property accepted in the state and "known to be destined to a point within the state of Missouri." It was further provided that "if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the state of Missouri such property shall not be terminated within the state of Missouri."

The reason for the attempted cancellation of plaintiff's interstate permit was, as it was charged, that he was operating in violation of said permit. Such violation consisted in carrying property from one point in Missouri to another point in Missouri as an intrastate carrier whereas he did not have a license as such.

Although the plaintiff made no complaint of the license fees exacted under the laws of Missouri, nevertheless, he has not paid the usual fees since the granting of the temporary restraining order on December 31, 1936. He has been carrying on his regular business as a carrier under the protection of this court's restraining order. As a result, a supplemental answer has been filed asking this court to grant a hearing in the nature of an accounting of fees to the State of Missouri from the plaintiff on account of his operations since the protective restraining order was granted.

The temporary injunction heretofore granted by this court was predicated upon the record of evidence before the Public Service Commission, ex parte affidavits, and some additional oral testimony. At that time it was made to appear that a small percentage of the property carried by plaintiff was between points in Missouri, and that such transportation was effected by carriage from St. Louis, Missouri, to a terminal station in Kansas City, Kansas, and, that, because of a zone within which a pickup service was authorized, a small amount of property was picked up in Kansas City, Missouri, assembled at the terminal in Kansas City, Kansas, and then transported to St. Louis, Missouri for delivery.

The facts as then presented warranted the court in issuing a temporary injunction, as a matter of judicial "convenience" until final hearing on the merits. Plaintiff has regular line hauls and fixed terminal depots. Its chief line hauls are between its terminals or depots at St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. Between these points admittedly it hauls a large volume of freight. From its depot or terminal point at Kansas City, Kansas, it has a pickup zone with a radius of twenty-five miles. Its terminal in Kansas City, Kansas, is within one-half mile of the Missouri State Line and a very few blocks from the trafficway connecting Kansas City, Kansas with Kansas City, Missouri.

At that point, according to the testimony, it is in very close proximity to several heavy shippers, including meat

packers. There is an inference from the testimony that it hauls considerable property for these shippers. During its operations it has carried a great deal of merchandise from shippers or consignors at St. Louis, Missouri, to consignees in Kansas City, Missouri. In many instances such shipments were made in truckload lots so that the plaintiff continued the line haul from his terminal in St. Louis to the depot or terminal in Kansas City, Kansas, and a new driver, and probably a new tractor, made the delivery by transporting the same merchandise or property back into Missouri over the identical trafficways used in going to the terminal in Kansas City, Kansas.

Plaintiff testified that its transportation of property or merchandise between points in Missouri aggregated 10 per cent of his traffic. One witness for the defendant testified that the percentage aggregated 40 per cent of the entire business across the state. Another witness testified that the intrastate traffic would aggregate 25% of the total volume. In many instances it was the habit of shippers in Missouri to consign their merchandise to themselves or some person at the terminals in Kansas City, Kansas, and then reconsign the same merchandise to a Missouri point.

Other facts will be stated as they become pertinent in the course of this memorandum opinion.

1. At the outset, it is contended by the plaintiff that, having engaged in interstate commerce, the acts of Congress would be supreme and exclusive, and that he is not subject to supervision by state authorities.

Such was the holding in Missouri Pacific Railroad Co. *v.* Stroud, 267 U. S. 404, *loc. cit.* 408. The court said: "It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive."

An examination of the national Motor Carriers Act, however, does not reveal an intention of the Congress to occupy the entire field and to exclude the authority of the states. Section 302, Title 49, U. S. C. A. contains a "Declaration of policy and delegation of jurisdiction to Interstate Commerce Commission." By subdivision (a) of said Section it is the expressed purpose of the Congress to

"cooperate with the several states and the duly authorized officials thereof * * * in the administration and enforcement of this chapter." And then, by subdivision (c):

> "Nothing in this chapter shall be construed to affect the powers of taxation of the several states *or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof.*"

It will be seen from the foregoing that it was the intention of the Congress to leave with each state the exclusive right to regulate and control intrastate commerce by motor carriers on the highways of such state. This exclusive right could not be exercised properly if the state were compelled to await a determination and a conclusion of the interstate commerce commission in every case as to whether traffic belonged to interstate commerce or to intrastate commerce. It must be obvious that in case the Interstate Commerce Commission should determine that a particular haul or carriage was interstate commerce, a ruling to the contrary by the state authorities would be unavailing, but in the absence of conflict, the decision of the State authorities would prevail.

Again, it appears from the evidence that the Interstate Commerce Commission, because of a congestion of applications from motor carriers, has been unable to exercise prompt supervision over interstate motor carriers.

In the case of Sproles *v.* Binford, 286 U. S. 374, 1. c. 390, the court said:

> "'In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.'"

This principle was taken and approved from the case of Morris *v.* Duby, 274 U. S. 135.

The rule announced in the Minnesota Rate cases, 230 U. S. 352, was to the effect that the states may act within their respective jurisdictions until Congress sees fit to act. In this case, while the Congress has acted, it has not only left with the states a large measure of authority in determining what is and what is not intrastate commerce, but it has not as yet been able to make its legislation effective. Until that has been done, the federal courts must, in a large measure, recognize state regulations and follow the decisions upon such regulations by the duly constituted state authorities. In this case, the Public Service Commission of the State, after due process, has determined that the plaintiff was engaging in intrastate commerce, and that because of such violation of its interstate permit the commission exercised its right under the statute to cancel such permit.

2. However, assuming that the ruling of the Public Service Commission of Missouri is not binding upon us, in the absence of a definite contrary ruling by the interstate commerce commission, the question for us to determine is whether the operations of the plaintiff as gleaned from the above facts were, in a part at least, intrastate. This is purely a factual question. Ohio R. R. Commission *v.* Worthington, 225 U. S. 102, loc. cit. 108.

As said in the last case, loc. cit. 110, "The test of through billing is not necessarily determinative" of the question as to whether it is intrastate or interstate commerce.

The subject was discussed in Southern Pacific Terminal Co. *v.* Interstate Commerce Commission and Young, 219 U. S. 498, where a shipment was made from sundry points in Texas to a shipper as consignee at Galveston. At that point the property shipped was prepared for export. The court properly held that such transportation was within the jurisdiction of the Interstate Commerce Commission. The shipper was denied the advantage of a lower tariff, because the court said that it constituted an undue preference in his favor.

In the case of Baltimore & Ohio S. W. R. R. Co. *v.* Settle, 260 U. S. 166, *loc. cit.* 170, the court said:

> "And whether the interstate or the intrastate tariff is applicable depends upon the essential character of

> the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration."

The court then cited some of the cases hereinbefore discussed, as well as Texas & New Orleans R. R. Co. *v.* Sabine Tram Co., 227 U. S. 111, Railroad Commission of Louisiana *v.* Texas & Pac. Ry. Co., 229 U. S. 336.

Conversely to the contentions here made, the Supreme Court held in Baltimore & Ohio Co. *v.* Settle, *supra*, adopting the same principle announced in Baer Bros. Mercantile Co. *v.* Denver & R. G. R. R. Co., 233 U. S. 479:

> "That a carrier cannot, by separating the rate into its component parts, charging local rates and issuing local way bills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of the benefit of an appropriate rate for a through interstate movement."

In this case, the plaintiff hauled truckloads of merchandise from shippers or consignors in St. Louis, Missouri, to consignees in Kansas City, Missouri. It was neither a normal nor a natural route, to extend the carriage to the terminal depot in Kansas City, Kansas. There was no reason for it. It was not a matter of convenience to the shipper, nor was it a matter of convenience to the carrier. Immediately that the haul terminated at the depot or terminal in Kansas City, Kansas, a new driver and in some instances with the same tractor took the merchandise or property back over the same trafficway and effected immediate delivery in Kansas City, Missouri. It was patent that the object of the shipper was to secure the benefit of a lower tariff by converting the shipment into an interstate haul. The shipping charges were approximately one-third less if in interstate commerce than if in intrastate commerce.

The plaintiff has cited in support of his contention the very recent case of Roundtree *v.* Terrell *et al.*, decided February 17, 1938, in the Northern District of Texas. That case, as this case, pended before a three-judge court. The

motor carrier hauled merchandise from points in Texas, through Texarkana to Little Rock, Arkansas. Some of the shipments or consignments were unloaded at a terminal or depot in Texarkana, Arkansas, and then carried back and delivered to consignees at Texarkana, Texas. The Texas court upheld the operation as interstate commerce. In doing so, it said that the pickup or delivery truck at Texarkana was not a line haul truck, but it was a local truck bearing an Arkansas license. It said, furthermore, that the merchandise from the line haul came to rest and was unloaded at the carrier's depot in Texarkana, Arkansas. The court further found concerning the shipment:

> "It is unloaded there in the night time, and the next morning the local delivery truck makes delivery of it within the municipal limits to whichever side of the city it may be consigned. * * * The line trucks reach Texarkana about four or five o'clock in the morning, all places of business are closed, such freight as is consigned to that point is unloaded and locked in the warehouse, the line truck then proceeds on to Little Rock. * * * The freight which originates in Texas and is subsequently delivered to Texarkana, Texas, must be and is transported over the line into Arkansas, and comes to rest in the warehouse in that state."

The court then said concerning this method of operation:

> "It would not seem appropriate to compel the complainant to deliver freight in Texarkana, Texas, as he passes through in the night time rather than following his legally chosen method of unloading it at his warehouse and then delivering it to the consignee, by another carrier, during business hours."

The situation here is vastly different. In a few instances no doubt the merchandise picked up at St. Louis is unloaded at the terminal or depot in Kansas City, Kansas, and, in that event, as we held on our first hearing, such operation would not be a violation of the interstate permit. On this point, it appears that the Congress intended to leave to the states the exclusive right to control and supervise shipments

between points in the same state, even though, by reason of an interstate routing, the property was given an interstate character. The last proviso of Subdivision (a) of Section 306, Title 49, U. S. C. A. is as follows:

> "And provided further, that this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

Quite obviously the Congress undertook to avoid controversies and disputes such as the one involved in this case. The Interstate Commerce Commission would exercise jurisdiction over such commerce only in those cases where the state authorities had failed to do so.

The facts in this case are similar to Sprout *v.* South Bend, 277 U. S. 160, *loc. cit.* 168, where the court said:

> "The legal character of this suburban bus traffic was not affected by the device of requiring the payment of a fare fixed for some Michigan point or by Sprout's professing that he sought only passengers destined to that State. *The actual facts govern.* For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce."

The testimony in support of the plaintiff tended to show that his depot or terminal in Kansas City, Kansas was in close proximity to a number of large shippers. The inference intended to be drawn was that it was because of these shippers that the terminal was located in Kansas City, Kansas and so close to the line between the states of Missouri

and Kansas. It might be questioned, however, with a pickup and delivery zone with a radius of 25 miles, if the depot were so positioned as to accommodate heavy shippers whose factories and places of business were nearby.

Plaintiff's pickup zone at Kansas City, Kansas was so laid out as to cover Kansas City, Missouri. By this device, the plaintiff could carry all the intrastate shipments between St. Louis and Kansas City and extend to the shippers an interstate rate far below the tariffs for purely intrastate hauls. The arrangement could not be justified upon a theory that it was a usual and regular route, as in the case of Mo. Pac. Railroad Co. *v.* Stroud, 267 U. S. 404, where the court upheld a shipment between points in Missouri as interstate commerce for the reason "that the usual and regular way of routing cars loaded with lumber at Oxly and consigned to St. Louis would be over the latter route through the State of Illinois and would be interstate commerce."

3. It is a matter worthy of comment that the plaintiff accepted a license from the Public Service Commission which specifically forbade that he should haul property between points in Missouri. The Public Service Commission had promulgated a rule which prohibited the transportation of merchandise between points in Missouri under interstate permits. Such acceptance was a voluntary act on the part of the plaintiff. He had his choice, either to refrain from hauling merchandise and property between points in Missouri under his interstate permit, or to secure a certificate of convenience and necessity as an intrastate carrier. He was not under the compulsion mentioned in Union Pacific R. R. Co. *v.* Public Service Commission of Missouri, 248 U. S. 67, where the court said that the carrier company was compelled to take out a license or a certificate under the menace of a penalty which meant irreparable loss. The court decided that the complainant's act in accepting the terms of the certificate was not voluntary.

As said in Pullman Company *v.* Kansas, 216 U. S. 56, *loc. cit.* 66, "by accepting the privilege it has voluntarily consented to be bound by the condition."

This principle was upheld in Pierce Oil Corp *v.* Phoenix Refg. Co., 259 U. S. 125.

Plaintiff would therefore have no right to challenge the validity of the said Rule No. 44.

4. The defendant has filed a supplemental pleading wherein there is a prayer for an accounting of fees accumulated during the operations of the plaintiff since the granting of the original restraining order, December 31, 1936.

While the injunction granted by this court prohibited the defendant Public Service Commission from revoking and cancelling plaintiff's permit as an interstate carrier, such injunction in nowise relieved the plaintiff of the obligation to pay statutory or prescribed license fees. No reason appears why such payments should not have been made. On the contrary, there is every reason why the plaintiff in a proceeding in equity should not meet all of the reasonable exactions of the state as condition precedent to the operations carried on by him.

Under Equity Rule 30, a defendant has a right to interpose a counter-claim "arising out of the transaction which is the subject-matter of the suit." It is doubtful whether these claims arose out of the transaction which is the subject matter of the suit, and, yet because of the injunction, the plaintiff elected to discontinue the payment of fees.

No objection having been made to the filing of the counter-claim, this court will not interpose one under the circumstances of the case. The question having been presented, it should be considered by us.

In Piedmont & N. Ry. Co. *v.* Query, 56 F. (2d), 172, *loc cit.* 175, the court said in discussing similar questions:

> "And if either of these is a substantial question under the Constitution, we must proceed with the consideration of the other questions presented; for in such case the jurisdiction of the court extends to every question involved, whether of federal or state law, even though the court may not find it necessary to decide the federal question."

In Sovereign Camp, W. O. W. *v.* Murphy, 17 F. S. 650, *l.c.* 652, a case like this heard before three judges sitting in the Southern District of Iowa, the court said:

> "But the duty imposed on the three-judge court • • • carries with it the duty on the part of the same three-judge court to try the whole case. The parties cannot be relegated to piecemeal trials of the several issues joined by them in their case."

The same principle was announced in Greene *v.* Louisville Railroad, 244 U. S. 499, *loc. cit.* 508, where the court said that:

> "The jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all."

In view of the above, unless the parties can agree after an inspection of the records upon the amount of the accumulated fees, it will be necessary to appoint a master to take an accounting and make his report to the court.

The injunction heretofore granted will be dissolved. The parties will be given thirty days from the filing of this opinion to agree upon the amount of the accumulated fees due under the counterclaim. If such agreement is not made within that time or within an extension for that purpose granted within that time, a decree will be entered dissolving the temporary injunction, refusing the permanent injunction and appointing a special master to determine the amount of fees payable under the counterclaim.

If such agreement as to fees is reached within the time above allowed, a decree will be entered dissolving the temporary injunction, refusing the permanent injunction, dismissing the bill upon its merits and awarding recovery upon the counterclaim for the amount so agreed upon.

Findings of Fact

The court finds from the evidence in the case:

1. That the carriage of property from St. Louis, Missouri, to Kansas City, Kansas, and thence back into Kansas City, Missouri, for delivery, was not the normal, regular, or usual route for shipping merchandise or property between St. Louis and Kansas City, Missouri.

2. That the terminal or depot used by the plaintiff in Kansas City, Kansas was approximately one-half mile from the Missouri State Line by a used trafficway between Kansas City, Missouri, and Kansas City, Kansas.

3. That the route used by the plaintiff from St. Louis, Missouri, to his depot or terminal in Kansas City, Kansas, was through Kansas City, Missouri, and that the same trafficways were used in making deliveries of merchandise or property after same had been hauled in the first instance to the terminal in Kansas City, Kansas, and that such deliveries involved a retracing in part of the identical routes.

4. That, after reaching the terminal or depot in Kansas City, Kansas, plaintiff in many instances did not unload the merchandise, but used the same trailer employed in making the carriage from St. Louis, and hauled said property back over the identical route used in going to his depot in Kansas City, Kansas, in making deliveries in Kansas City, Missouri, and North Kansas City, Missouri.

5. That a considerable portion of the operations carried on by plaintiff was in hauling property or merchandise between St. Louis, Missouri, and Kansas City, Missouri, and that much of such shipments was in carload lots, and that the method employed by the plaintiff was to haul such merchandise or property to his depot or terminal in Kansas City, Kansas, where a new driver, either with the same tractor and trailer, or with another tractor and the same trailer, would return the merchandise to Kansas City, Missouri.

6. That, in some instances, merchandise or property shipped between St. Louis and Kansas City was actually unloaded at the depot in Kansas City, Kansas, and then distributed to the consignees in Kansas City, Missouri. This, however, was a negligible percentage of the shipments between Missouri points.

7. That, prior to April 1, 1936, deliveries from the Kansas City, Kansas, depot to points in Missouri were made by an independent agency, but that subsequent to said date, such deliveries were made by plaintiff and are now being made by him.

8. That the rates for interstate carriage between St. Louis, Missouri, and Kansas City, Kansas, were much lower than intrastate transportation tariffs between St. Louis, Missouri, and Kansas City, Missouri, and that the expense of delivery from Kansas City, Kansas depot was not as great as the difference in tariffs.

9. That the method of operation employed by the plaintiff was designed and intended to afford shippers the benefit of a lower rate, and that the transportation service rendered by him between St. Louis, Missouri, and Kansas City, Kansas, was not in good faith.

10. That the plaintiff voluntarily accepted an interstate permit with such terms and conditions as prohibited him from hauling merchandise between points in Missouri, and that permitted him only to carry property in interstate commerce between points in Missouri and points in other states and from points in other states to points in Missouri.

11. That the license fees and other charges made by the State of Missouri against the plaintiff for the use of the highways of the State of Missouri as an interstate motor carrier during the time the restraining order and temporary injunction of this court have been in force have accumulated, but have not been paid by the plaintiff although the injunctive relief sought by him did not relieve him, nor was it intended to relieve him, of the obligation to pay such fees and charges, nor did he seek to be relieved of such fees and charges. The court makes the following

CONCLUSIONS OF LAW.

I.

That the act of the Public Service Commission in Missouri in cancelling and revoking plaintiff's permit as an interstate carrier was a valid and constitutional exercise of its power.

II.

That the plaintiff had violated the express terms of its interstate permit.

III.

That the plaintiff has no right to challenge the constitutional validity of Rule Number 44 promulgated by the Public Service Commission.

IV.

That the plaintiff is indebted to the State of Missouri for license fees and charges accumulated since the granting of a temporary restraining order in this case, and the sttae is entitled to judgment therefor.

A concurring opinion (omitting caption) was written and filed by Stone, J., which is as follows:

I concur in the findings of fact and conclusions of law stated by Judge Reeves. I concur in much of his opinion. I desire to add a thought mainly concerned with the construction to be given to a portion of Section 303 (1) of the Motor Carrier Act, 1935.

Plaintiff seeks to enjoin revocation of a permit or license issued him by the proper Missouri authorities, to operate trucks over Missouri highways in interstate commerce. At the time this permit was granted, the grant was subject to Rule 44 of the Missouri authorities which forbade such licensed interstate carriers to "accept for transportation within this State any * * * property known to be destined to a point within the State of Missouri." Unless the limitation of this Rule was void *as to plaintiff* when the permit

was issued or has become so since, it is clear that he has violated the permit and his permit or license is subject to revocation.

It seems to me this limitation was and is valid *as applied to this plaintiff and as to his transactions here involved.* That this regulation affects interstate commerce is clear. Whether it is invalid depends upon whether the regulation unduly affects—burdens—interstate commerce or unduly discriminates against such commerce. This rule of law is of years standing and is declared in numerous decisions of the Supreme Court. The difficulty is not with statement of the rule but with its application to specific situations,

Rule 44 is not *per se* discriminatory against interstate commerce. In some instances it might be, in others it might not be. Therefore, the problem as to discrimination depends upon the facts of the particular situation.

Rule 44 had a good purpose, namely, to prevent intrastate commerce being carried on under the guise of interstate commerce and thus fraudulently removing such from the regulation and control of the State. Truck and bus transportation is peculiarly liable to such abuse. Other transportation is not because it depends upon fixed physical equipment.

Another consideration is that the highways are built, maintained and belong to the State. Necessarily, the State has a large measure of control over the use of those highways.

It seems clear that this Rule would be valid, absent Congressional action, even though it "materially affected" interstate commerce (S. C. State H. Dept. *vs.* Barnwell Bros., U. S. (Decided February 14, 1938), p. 6). Is the "Motor Carrier Act, 1935" such Congressional action as to render it invalid? I think not.

It is true that that Act (Section 303 (1)) defines interstate commerce as including commerce "between places in the same state through another state", but Section 302 (c) declares that "nothing in this chapter shall be construed * * * to authorize a motor carrier to do an intrastate business on the highways of any state, or to interfere with the exclusive exercise by each state of the power of regula-

tion of intrastate commerce by motor carriers on the highways thereof."

It seems to me that to give full force to these two provisions we should construe the word "through" as used in Section 303 not to include a situation where the carriage is merely over a state line and immediately back again for final delivery. "Through" is a word of common meaning. Primarily, it means "from one end or side to the other" (Webster's New International Dictionary). Although the word may have a more restricted meaning, if the text compels such construction, yet it is difficult to conceive a trip from St. Louis, Missouri, across the State of Missouri, through Kansas City, Missouri, and a half mile into Kansas City, Kansas, with an early return to Kansas City, Missouri, by the same route, as being described as "through" Kansas. If it can be, then much of the power of state regulation over what is in true essence intrastate commerce can be taken away merely through the subterfuge of darting across a state line and back again. I think this word "through" should be construed to cover only the situations where *an ordinary and proper* course of travel along a highway between the point of origin and the point of destination of a shipment would *naturally* result in a carriage across a state line and back again. If there is a choice of natural routes between the above points—one interstate and one intrastate—the carrier may use either and such use will determine the character of the shipment (interstate or intrastate) and the motive in making such choice is immaterial. But where the movement is merely to loop over a state line and back in an entirely unnecessary and abnormal movement, I think it should not be said that the shipment has passed "through" the other state within the meaning of the Motor Carrier Act. When we remember the relation of the state to the highways; the vast network of interlacing highways throughout the country; the number of cities at or near state lines; and the facility with which trucks and buses can cross state lines by deviation of only a few miles and thus divert what is really and truly an intrastate carriage into an interstate carriage, I think we should not construe the Act as including within interstate

commerce every truck and bus that crosses a state line no matter how trivial or for what purpose.

Applying the above thoughts to the situation here we find a considerable business being done by this trucking company which is essentially an intrastate business. The feature relied upon to make it interstate business is that it goes about a half mile beyond the Missouri-Kansas line and then is brought promptly back into Missouri—by the same or practically the same route used when it crossed over the state line. This is done under the guise of a "delivery service". That service extending for at least twenty-four miles into Missouri and including within that radius all of Kansas City, Missouri, North Kansas City and some miles into Clay and Jackson Counties, Missouri—in short, the entire commercial and industrial territory of Kansas City, Missouri, and vicinity.

If this can be done, it seems to me it must be by ignoring the usual meaning of the word "through" and in violation of the statutory injunction that "nothing in this chapter shall be construed * * * to authorize a motor carrier to do an intrastate business on the highways of any state or to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

A dissenting opinion (caption omitted) was written and filed by Otis, J., which is as follows:

I regret exceedingly my inability to concur with my learned colleagues in the disposition of this case. I can not concur even in the Findings of Fact. Quite probably I am wrong, quite probably my colleagues are entirely right. I would not set out my views at all except that I do not wish hereafter to be understood as having concurred in ideas with which I cannot agree. I shall sign the decree, of course, since, when determined upon by the majority of the Court, it is the decree of the Court, and since I understand it is the proper practice for a dissenting judge to joint in the decree.

After the hearing upon plaintiff's application for a temporary injunction this court handed down its unanimous

per curiam opinion and made Findings of Fact. The evidence received at that hearing substantially was the same as that given on final hearing. Then we unanimously were of the opinion that an injunction should issue. Since the Findings of Fact which we made then best described (except in one trifling particular which will be indicated hereafter) the true character of plaintiff's business and the manner and method of his operation, I repeat them in *haec verba* here.

1. The plaintiff transports freight by automobile trucks as a common carrier between freight terminals or depots located in St. Louis, Missouri, Kansas City, Kansas, Wichita, Kansas, Des Moines, Iowa, and Burlington, Iowa. By far the largest part of its business consists of the transportation of goods from points in one state to points in other states. A small percentage of its business (approximately 5%) consists in the transportation of goods from points in Missouri to other points in Missouri, chiefly from Kansas City, Missouri, to St. Louis, Missouri, and from St. Louis, Missouri, to Kansas City, Missouri.

2. At St. Louis, Missouri (and so also at each of the cities at which plaintiff has a terminal or depot) the plaintiff renders to its patrons a so-called "pick-up" service. This service it renders to all its patrons living within a circle having a radius of twenty-five miles, the center of which is at the plaintiff's terminal or depot. The plaintiff picks up at the place of business of a patron the consignment he desires to have transported, carries that consignment to the terminal or depot, unloads it on a dock there situated, thence it is loaded on a line truck and by that line truck transported to some other of the plaintiff's terminals or depots. It is unloaded from the line truck at the terminal or depot of its destination. At that terminal or depot, as at each other of plaintiff's terminals or depots, a "delivery service" is rendered by plaintiff.

Plaintiff causes the shipment to be loaded on to a delivery truck and by that truck carried to the place of business of the consignee. This "delivery service", like the "pick-up" service, is rendered to patrons of the plaintiff living

within a circle having a twenty-five mile radius, the center of which is the terminal or depot of the plaintiff. Since the St. Louis "pick-up" service area of the plaintiff, the center of which is the St. Louis, Missouri, terminal of the plaintiff, necessarily includes a part of Missouri, and since the Kansas City, Kansas "delivery" area, the center of which is at the plaintiff's terminal in Kansas City, Kansas, necessarily also includes a part of Missouri, some consignments will be from consignors whose places of business are in Missouri to consignees whose places of business also are in Missouri. All consignments, however, from the St. Louis, Missouri "pick-up" area to the Kansas City, Kansas, "delivery" area are transported in due and regular course of plaintiff's business (and necessarily are so transported) from plaintiff's terminal or depot in St. Louis, Missouri, to plaintiff's terminal or depot in Kansas City, Kansas. So also as to consignments from the Kansas City, Kansas, "pick-up" area to the St. Louis, Missouri "delivery" area.

3. Conforming with laws enacted by Congress plaintiff has filed with the Interstate Commerce Commission schedules of its rates for the transportation of freight and full information touching the points between which it carries freight, and in connection with each of these points a full statement as to the "pick-up" and "delivery" service there rendered and the areas within which that service is rendered, all of which it is required to do by laws enacted by Congress. The plaintiff carries no freight except in accordance with its freight rates on file with the Interstate Commerce Commission. Plaintiff carries no freight between any points in Missouri save and except that which in the usual and regular course of its business it carries from a terminal in one state to a terminal in another state.

The evidence received at the final hearing would justify a finding that it was 10% rather than 5% of plaintiff's business which originated in Missouri and was destined for consignees in Missouri. Such trifling difference, however, justifies no difference in the conclusions reached. Beyond any possibility or controversy, in my judgment, every part of plaintiff's business is interstate commerce. While Mis-

souri, in the absence of Congressional occupancy of a particular field may so legislate as to affect interstate commerce (as by regulating the size of trucks, prescribing particular routes to be traversed by them, regulating the speed at which they may travel (Missouri has no power whatever, directly or indirectly, by refusal to grant a permit or by conditioning a permit granted, to prevent and prohibit interstate commerce in a single pound of freight. But that is what the Public Service Commission is endeavoring to do here. We enjoined it temporarily. We should enjoin it permanently.

In none of the formal conclusions of law announced by the majority is it ruled that any part of the carriage of freight by plaintiff is not interstate commerce. The mere fact that freight is put on board a truck in Missouri and is delivered in Missouri certainly does not make the transportation of that freight the less interstate commerce, if a state line is crossed in its transportation. Mo. Pac. R. Co. *v.* Stroud, 267 U. S. 404. It is suggested, however, in the opinions of the majority, that occasionally the plaintiff would carry a whole truckload of freight from a consignor in St. Louis, Missouri, to a consignee in Kansas City, Missouri, that that truckload would be carried directly past its Missouri destination over a given route to plaintiff's Kansas City, Kansas terminal, that the truck then would be turned around, perhaps with a change of tractor and a change of driver, driven back over the same given route to the consignee's place of business in Missouri, which it had passed an hour or two before. My colleagues think that that would be mere subterfuge and evasion. If that were all, I should think so too. But I do not think it would not involve interstate commerce. Such a movement would in reality be two movements, not one continuous movement, but two movements, one intrastate, the other interstate. That one of these two movements which is wholly intra-state the state may prohibit. That movement does not become interstate because an entirely independent and useless interstate movement is superimposed upon it.

But the suppositious case is not this case. I do not think the evidence in this case indicates that there ever was a single such instance in the transportation carried on by

plaintiff. The evidence does indicate that occasionally, very rarely, plaintiff will carry an entire truckload of freight consigned in St. Louis, Missouri, to a consignee in Kansas City, Missouri. That truck will travel over plaintiff's usual and normal route to the terminal in Kansas City, Kansas. At the terminal that truck is turned over by the driver and its load is checked but it is not unloaded and the load put in another truck, which would be a foolish and wasteful thing to do. A new tractor is attached to the same truck and with a different driver the truck is taken with its load to the consignee in Missouri. There is no evidence that that consignee ever would be on the identical road over which the truck previously had passed. In any event, that truckload must be dealt with *at the terminal*. There the freight must be checked and the driver relieved from further responsibility. It is not usual for freight to be thrown off a train between stations although the consignee lives between them.

As I understand the views of my colleagues, they believe there is a distinction between (a) carrying some freight from a point in Missouri to a point in Missouri *as a part of* a truckload (which, of course, must be separated *at the terminal* from other freight in that truckload) and (b) carrying other freight from a point in Missouri to a point in Missouri, which, because it fills a truck, requires no separation at the terminal from other freight and requires no transfer from one truck to another. Carriage of character (a), my colleagues think, is interstate commerce, while carriage of character (b) is intrastate. I cannot agree that the slight and altogether reasonable differences in these two methods of handling freight possibly can affect the character of the commerce involved in either. It is entirely possible that I have interpreted incorrectly the views of my colleagues.

In the separate concurring opinion of Judge Stone special emphasis is placed upon Rule 44 prescribed by the Public Service Commission. Since that rule is not set out in its precise terms in either of the opinions of my colleagues I set it out. It is as follows:

> "No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to

a point within the State of Missouri. If such interstate carrier accepts within Missouri a passenger whose destination is beyond the limits of the State of Missouri, such passenger shall not be permitted to terminate his trip within the State of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri."

It seems to me this rule cannot reasonably be interpreted to apply to plaintiff's operation. It will not be so interpreted if the whole rule is read together. The second sentence of the rule makes clear what is meant by the first sentence of the rule.

It is provided in the first sentence of the rule that "No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri." But it is clear from the second sentence that what is aimed at in the first sentence is a transportation of persons or property *which is wholly within the state* on a contract to transport beyond the state. That, at least, is a reasonable interpretation and it is the only interpretation consistent with constitutional principles.

Plaintiff's operation which the Public Service Commission attacks either is interstate commerce or it is not interstate commerce. If it is not interstate commerce of course the state can prevent it for plaintiff has authority to engage only in interstate commerce. The only purpose of any reference to Rule 44 in this case is on the theory that plaintiff's operation is interstate commerce of such a character as violates Rule 44 and that Rule 44, if construed to apply to that operation, is a valid rule. I have said that the rule should not be interpreted to apply to plaintiff's operation. I now say that if so interpreted it has no validity whatever.

Whence did the Public Service Commission derive any authority to adopt Rule 44? Undoubtedly from Section 5267 (b) R. S. Mo. 1939, as amended, where it is set out that—"The Public Service Commission shall have power and authority by general order or otherwise to prescribe

rules and regulations governing all motor carriers." But into that statute must be read the implied provision that no such rule or regulation may violate the federal Constitution. Given a rule or regulation, no such construction should be placed upon it as will make it violative of the federal Constitution.

Judge Stone believes that even although Rule 44 is interpreted to apply to plaintiff's operation (and the Public Service Commission has so interpreted it), nevertheless it may be valid, that it only "affects" interstate commerce. It is at that point that I find myself unable to concur with my learned colleague. As now interpreted the rule does not "affect" interstate commerce, it *prohibits* it. Note the very language of the rule: "No driver or operator operating under an interstate permit *shall* accept for transportation within this state *any* person or property known to be destined to a point within the State of Missouri." I may be utterly in error, but certainly it is my view that no state can prohibit, by any method, interstate commerce in any subject of legitimate commerce. No state can do that whether or not Congress has legislated in the field.

Even in the field of regulations which do not prohibit but only affect interstate commerce the power of the state vanishes when once Congress has assumed jurisdiction and has legislated. Exactly that is the situation here. Congress has legislated in the field of transportation in interstate commerce by motor vehicles. Motor Carrier Act 1935. Section 303(1) of that Act defines interstate commerce so as to include commerce "between places in the same state through another state." My learned colleague believes that the word "through" in the Congressional definition (which was but the restatement of several decisions of the Supreme Court) does not describe "a situation where the carriage is merely over a state line and immediately back again for final delivery." The definition from Webster's Dictionary is set out, indicating that the primary meaning of "through" is, "from one end or side to another." But if that primary meaning is the meaning here, the word certainly was misused.

I think the meaning is that in which the word "through" was used by Mr. Justice Holmes in Western Union Tele-

graph Co. *v.* Speight, 254 U. S. 17. In that case a telegraphic message originated in North Carolina and was for transmission to a point in the same state. It was so routed as to pass through a part of Virginia. It was found as a fact that that routing was "for the purpose of fraudulently evading liability under the law of North Carolina." Mr. Justice Holmes said: "The transmission of a message *through* two states is interstate commerce as a matter of fact. The fact must be tested by the actual transmission." Again he said: "The court below * * * held that when as here the termini were in the same state the business was intrastate *unless it was necessary to cross the territory of another state* in order to reach the final point. This * * * is not the law."

It seems to me that the word "through", as used by Congress, cannot be limited in its meaning to a more or less extensive carriage through another state (who will determine the minimum carriage which will amount to carriage "through" another state?) Certainly it should not depend upon the purpose in the carrier's mind. As in Telegraph Co. *v.* Speight and in Mo. P. R. Co. *v.* Stroud, *supra*, it should depend upon the *fact*, upon whether a state line is crossed. If the purpose is evasion of state law, of what significance is that? As the zone of state law is passed the zone of federal law is entered. There is no "no man's land" between these zones where lawlessness obtains.

My colleague forcibly says that there is danger "that what is in true essence intra-state commerce can be taken away merely through the subterfuge of darting across a state line and back again." But the evidence in this case does not disclose a mere darting across a state line and back again. It does not record a single instance of that kind. And if it did, it would not be in its "essence" intra-state commerce, if the movement is a single movement. How can any movement be wholly intra (within a) state which crosses a state line?

2. Defendants have asked leave to file a counter-claim. The plaintiff, it is alleged, owes the state fees for the use of the highways which fees it has not paid. It is sought to

recover them by this counterclaim. There are two reasons why I think the counterclaim should not be permitted to be filed, although I have little doubt that the fees sought are owing.

Equity Rule 30 authorizes (1) a "counterclaim arising out of the transaction which is the subject matter of the suit." Also it authorizes (2) a "counterclaim against the plaintiff which might be the subject of an independent suit in equity against him." Two classes of counterclaims are thus provided for. Moore *v.* Cotton Exchange Co., 270 U. S. 593. But obviously the counterclaim sought to be asserted here does not fall in class (2); it could not be made the subject of an independent suit in equity. (It might be made the subject of a suit at law.) Does it arise out of the transaction which is the subject matter of the suit?

It is said in the opinion of the majority that it is doubtful if this counterclaim "arose out of the transaction which is the subject matter of the suit." I should go further in the same direction and say that it is certain the counterclaim does not arise out of the same transaction. What was "the transaction" which is the subject matter of this suit?

The Public Service Commission revoked or threatened to revoke the plaintiff's interstate permit and threatened then to prevent plaintiff operating without an interstate permit. The suit arises out of the withdrawal or threatened withdrawal of the permit and consequence incident to that withdrawal. The right to fees arises out of the use of the state's highways by plaintiff. Certainly the (a) withdrawal of the right to use the highways and (b) the use of the highways are not the same thing, not the same transaction. They are scarcely comparable but, if comparable, they are not comparable as resembling one another but as opposites.

It is true that the plaintiff is operating under our temporary injunction. Because he is operating he owes fees. It may be said then that the counterclaim arises because of the injunction and that the injunction arose from the threatened withdrawal of the interstate permit. That, however, is a connection quite remote between counterclaim and "transaction" and not the immediate connection which the rule requires.

My second reason for believing this counter claim should ot be entertained is this. If plaintiff owes fees for the use f the highways of the state he owes them to the state or to he state treasurer for the state. Sec. 5275, R. S. Mo. 1929. Ie does not owe them to the Public Service Commission hose members are the defendants in this case. Nor have found any statute authorizing the Commission to sue for uch fees as the agent of the state.

3. In my view a permanent injunction should issue and eave to file the counterclaim should be denied.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ, Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF OPPOSING APPELLEE'S MOTION FOR BOND

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RIEF OPPOSING APPELLEE'S MOTION FOR BOND

Appellee has filed a motion to require appellant to give a d in the amount of Twenty-five Thousand Dollars ($25,-.00) "to secure and protect appellee in the amount of fees v owing by appellant to the State of Missouri * * * ." It s appears that appellee is asking for affirmative remedial ion in aid of a cause which has passed the stage when re-dial action may be properly granted. Several reasons occur us why the motion should be denied.

First: This case has now reached the stage when alleged ors are being considered and reviewed. Whatever remedy appellee was entitled to is a matter of proper consideration the trial court. We have never understood that it was proper function of a court of review (except in matters in ich it has original jurisdiction) to assume the duties of a l court, or to make direct or auxiliary orders of a remedial ure affecting the merits of the case. Any such orders must limited by, and made pursuant to the statutes and rules appellate practice.

Second: We find no precedent for such motion in the rules of this Court. All motions referred to in these rules appear to invoke some proper action affecting appellate practice. No such motion contemplates action by this Court on matters properly for the consideration of the trial court.

Third: Motion should have been filed with and passed on by trial court (and in fact was).

Fourth: All that we have stated in our brief anent the counterclaim may be restated here in opposition to the motion:

(1) Appellee has not alleged or proved its authority to sue for or to receive the fees sought to be secured by the bond. In this respect the counterclaim fails to state a cause of action and should never have been entertained by the trial court.

(2) The counterclaim attempts to set up a cause of action at law for the recovery in a purely equitable action of injunction. Equity Rule 30 prohibits such practice.

(3) By reason of the limitation of Equity Rule 30, the trial court had no jurisdiction of the counterclaim.

(4) The record affirmatively shows the counterclaim was never admitted as an issuable pleading in the course of the trial. The appellant had no knowledge that it was being considered; no evidence was offered in support of it. Consequently the judgment on the counterclaim deprives applicant of his property without the due and orderly processes of the law.

For these reasons we respectfully urge that the motion be denied.

Respectfully submitted,

D. D. McDONALD,
FRANK E. ATWOOD,
SMITH B. ATWOOD,
Counsel for Appellant.

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BRIEF ON BEHALF OF APPELLANT

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CASES AND STATUTES CITED

SUPREME COURT OF THE UNITED STATES

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PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ROY McKITTRICK, Attorney-General of the State of Missouri, and B. M. CASTEEL, Superintendent State Highway Patrol, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

APPELLANT'S BRIEF AND ARGUMENT

Official Report of Decision Under Review

The decision of the report below is reported in 23 Federal Supplement, at page 587.

Statement of Grounds of Jurisdiction

Appellant has complied with Paragraph 1 of Rule 12 of this court and a statement of jurisdiction has been printed under separate cover, to which reference is made in this brief.

STATEMENT OF THE CASE

This action was instituted to enjoin the Public Service Commission of Missouri from enforcing an order made pursuant to its Rule 44, and from causing the arrest and prosecution of

appellant for the transportation of freight in commerce of a character admittedly interstate, and also from arresting and prosecuting him for certain acts of freight transportation of a disputed character. There is no claim or charge that State police regulations were being violated by the admittedly interstate transactions. As to the disputed transactions, appellant neither obtained nor sought an intrastate permit, but upon the belief that such transactions were interstate in character, he claimed the right to engage in them under an interstate permit he held prior to its revocation under circumstances hereafter related.

Appellant Eichholz operates a fleet of freight trucks in interstate commerce between the states of Missouri, Iowa, and Kansas, and for that purpose, maintains depots or terminal facilities in St. Louis, Missouri; Des Moines, Iowa; Burlington, Iowa; Kansas City, Kansas and Wichita, Kansas. (Record, P. 89.) His interstate operations date back prior to the effective date of the Federal Motor Carrier Act of 1935 (See Appendix), and prior to a time when there was legislative regulation in Missouri either of intrastate or interstate freight transportation by motor vehicle. (Record, P. 89.) After legislation had been enacted in Missouri, he sought and obtained from the Missouri authorities a permit to engage in interstate transportation of freight over the highways of that state, and complied with all rules and regulations preliminary to the granting of the same, particularly with respect to the character of vehicles used, safety lights and equipment and insurance requirements. He neither sought nor obtained a permit to engage in intrastate transactions in Missouri. (Record, P. 89.)

When the Federal Motor Carrier Act of 1935 became effective, he sought, by application to the Interstate Commerce Commission, continuance of his privilege to engage in his interstate operations and issuance of a proper certificate in evidence of the same. His application has not yet been finally passed upon by the Commission. (Record, P. 92.) Meantime, under the terms of the Federal Act, he is privileged to continue such operations under Federal regulation.

Appellant's Kansas City, Kansas, depot or terminal was located and established very early in his operations. He had never established another terminal in the "Greater Kansas City" area. Its location was chosen for its convenient access to connecting carriers and to the greater number of shippers

who patronized him with more or less regularity. (Record, P. 90.)

Surrounding all his depots or terminals (including the terminal at Kansas City, Kansas), and within a radius of twenty-five miles thereof, appellant had established a "pick-up" and "delivery" service, the full details of the operation of which were on file with the Interstate Commerce Commission and with the Public Service Commission of Missouri. Briefly, operations consisted in "picking-up" shipments of consignors, transporting them to terminal or depot and there unloading the less-than-truck-load shipments onto the dock or onto the larger line-haul trucks which transported them to the terminal of destination. These line-haul trucks were of the tractor-trailer type. Accordingly, as to a full-truck-load consignment, an exchange of tractor and driver was necessary, but actual unloading at the dock was unnecessary. In every case, however, the shipment had to be dealt with at the terminal, where the operations of weighing, checking, inspecting, making out freight bills, making C. O. D. collections, assigning line-truck drivers, etc., were performed. The "delivery" service operated in a corresponding manner at the terminal of destination. Every shipment, large and small, traversed the full distance between terminals for these dealings, before they entered the phase of "pick-up" and "delivery" service. (Record, P. 90.)

The operations of this "pick-up" and "delivery" service at the Kansas City, Kansas, terminal necessarily extended into parts of Kansas City, Missouri. Such of these shipments as were picked up or delivered in Kansas City, Missouri, which were respectively destined for, or had originated in St. Louis, Missouri, were conceived by the Public Service Commission of Missouri, to be intrastate in character. The relation of the sum of these shipments to the sum total of appellant's commerce transactions was variously estimated at from 5% to 10%—that is to say, 90% of his commerce was indisputably interstate in character. (Record, P. 91.) In this connection it should be stated that there was a rate differential between intrastate and interstate carriage, the latter having the lower rate. Both rates, however, were the approved rates of the authority having respective jurisdiction thereover.

With this conception that appellant was engaging, in part at least, in intrastate transactions without an intrastate permit in violation of its Rule 44 (see Appendix), the Public

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Service Commission cited him to appear and show cause why his interstate permit should not be revoked. A hearing resulted in its revocation, thus denying appellant of the right to use the highways of Missouri at all.

In this situation, appellant instituted this action to restrain state officials from arresting, prosecuting or otherwise interfering with his operations in interstate commerce across Missouri. No injunctive relief was sought to restrain the State Treasurer from collecting lawful licenses and other fees that would accrue during such operations, said treasurer being the official designated by statute to receive such licenses and fees. A statutory three-judge court was convened, and temporary injunction was granted in accordance with a per curiam opinion appearing at page 8 of the Statement as to Jurisdiction, and the case later went to trial on the merits.

At the trial, appellee Public Service Commission presented for the first time a counterclaim for the recovery of license fees and dues alleged to have accrued during the period of the temporary injunction, although the Commission has no statutory authority to maintain an independent action for that purpose, and no right or authority to collect the same has been advanced in substantiation of the Commission's authority (Record, P. 77.) For this reason, and for the additional reason that Equity Rule 30 (see Appendix), forbade the entertainment of a counterclaim in these circumstances, objection was, and is here made to its consideration by the trial court on the ground that it had no jurisdiction to entertain it.

In due time after trial, the court rendered opinions dissolving the temporary injunction, denying the permanent injunction and finding against appellant on the counterclaim in full of the amount of accumulated fees, the parties were given thirty days in which to agree upon the amount; otherwise a special master would be appointed to ascertain the amount. On May 10, 1938, a decree was entered in accordance with the opinion of the court. Three opinions were rendered in the case, two representing the majority and one representing a dissenting minority. All opinions appear at pages 53 to 77, inclusive, of the Record, and are officially reported in 23 Fed. Supp. 587, et seq.

As will clearly appear from the majority opinions, one of the principal attacks upon the disputed operations of appellant was aimed at their good faith. At the time referred to in the evidence, there existed, as previously stated, a rate differential

between intrastate and interstate carriage of freight, the latter rate being the lower. That all freight crossed the state line into Kansas is not disputed. (Record, P. 71.) Appellee contends the crossing was a subterfuge to favor his patrons with the lower rate. Appellant, on the other hand, showed by the evidence that all freight must be dealt with at the terminal both before shipment and before delivery in the manner previously stated. (Record, P. 89-90).

It is the contention of appellant that the District Court abused its descretion in denying the permanent injunction, first, because it ascribed motives of bad faith in routing the disputed freight through the Kansas City, Kansas, terminal, inferred solely from the rate differential, and ignored the business reasons that made such routing necessary; second, because in denying it, appellant was left without protection from arrest, prosecution, fines and penalties, even as to the 90% of admittedly interstate transactions; third, because it makes motive control the character of the commerce, in defiance of the Congressional and judicial definition of the term "interstate commerce"; fourth, it placed the power of the State over the power of the Federal government in the regulation of commerce between states, by permitting the State's definition to control the Federal.

ASSIGNMENT OF ERRORS

1. The lower court erred in its conclusion of law that the act of the Public Service Commission of Missouri, in cancelling and revoking appellant's interstate permit under the circumstances of this case was a valid and constitutional exercise of its powers.

2. The lower court erred in not finding as a conclusion of law that the transportation of freight from Kansas City, Missouri, to St. Louis, Missouri, through appellant's fixed terminal or depot in Kansas City, Kansas, and from St. Louis, Missouri, to Kansas City, Missouri, through appellant's fixed terminal or depot in Kansas City, Kansas, constituted transportation in interstate commerce within the definition of that term as found in the Federal Motor Carrier Act of 1935 (U. S. C. A., Title 49, section 303 (a), par. 10). (See Appendix.)

3. The lower court erred in construing Rule 44 of the Public Service Commission of Missouri as applicable to any of appellant's operations between Kansas City, Missouri, and St. Louis, Missouri, which invariably required the shipments to pass through appellant's fixed terminal or depot in Kansas City, Kansas.

4. The lower court erred in not finding as a conclusion of law that Rule 44 of the Public Service Commission of Missouri, as applied by that commission to the transportation of freight across state lines, is unconstitutional and void because it is in direct conflict with the Congressional definition of interstate commerce contained in the Federal Motor Carrier Act of 1935.

5. The lower court erred in finding as a fact that the method of operation employed by the appellant was designed and intended to afford shippers the benefit of a lower rate (both the interstate and intrastate rates having been authorized by the respective Commissions) and that the transportation service rendered by him between St. Louis, Missouri, and Kansas City, Kansas, was not in good faith.

6. The lower court erred in finding as a conclusion of law that by accepting an interstate permit the appellant had

waived the right to challenge the constitutional validity of Rule 44 promulgated by the Public Service Commission of Missouri.

7. The lower court erred in finding as a conclusion of law that the appellant had violated the express terms of his interstate permit.

8. The lower court erred in not finding as a conclusion of law that the counterclaim filed in this cause by the Public Service Commission does not comply with Equity Rule No. 30, could not be made the subject of an independent suit against this appellant by the Public Service Commission of Missouri, and should be dismissed.

SUMMARY OF THE ARGUMENT WITH AUTHORITIES

ON THE MOTION TO DISMISS

I.

First Ground

Appellant's Jurisdictional Statement is not subject to the motion to dismiss.

(a) It conforms to Rule 12 of this court.

(b) It shows a justiciable question for this court.

(c) It does not perform the function of an assignment of errors, nor need it necessarily call attention to all the grounds reviewable on appeal.

(d) If the action complained of is unconstitutional and without authority, the Statement need not detail the alleged reasons that prompted the Commission to take the action.

II

Second Ground

The judgment on the injunction was final. It denied unconditionally the permanent injunction. In these circumstances an appeal to this court is provided. (U. S. C. A. Title 28, Sec. 380.)

The judgment on the counterclaim was final. The ascertainment of the amount, after this appeal was taken, was a ministerial act in fulfillment of the judgment of the court. Furthermore, the trial court had no jurisdiction to entertain it, under Equity Rule 30.

Smith vs. Vulcan Iron Works, 165 U. S. 518; 17 Sup. Ct. 407;

McGourkey vs. Toledo & Ohio Ry. Co., 146 U. S. 536; 13 Sup. Ct. 170;

3 C. J. pp. 448, 449.

ON THE MERITS

I.

The Commission may not, merely by refusing an interstate permit or by granting one upon condition, **prohibit** for any

reason the transportation in interstate commerce of a single pound of freight.

Buck vs. Kuykendall, 267 U. S. 307, 45 Sup. Ct. 324;
Florida ex rel. Motor Co. vs. Florida R. R. Commission, 166 South, 840;
Southwestern Greyhound Company vs. R. R. Commission, 99 S. W. (2d) 263, 268, 109 ALR 1235.

(a) A state statute purporting to give it this authority violates Article 1, Section 8 of the Federal Constitution.

(b) The limit of the Commission's authority is reasonable regulation of interstate commerce as agent of the state under its conceded police powers, and to punishment for non-compliance with such regulations.

c) To threaten punishment of appellant only and alone for engaging in admittedly interstate transactions after revocation of a perviously granted interstate permit, is one situation; to punish him for violation of lawfully imposed police regulation is quite another. The latter the Commission may do; the former it may not. Hence this appeal from a judgment denying injunctive relief from punishment from causes alone growing out of the first named situation.

(d) This phase of the case does not rest upon the character of the disputed transactions. It rests upon the power of the state to prohibit transactions in commerce admittedly interstate in character.

By reason of these considerations, the judgment of the District Court that the revocation of the interstate permit constituted a lawful exercise of authority by the Public Service Commission, was an abuse of judicial discretion.

II.

The character of the disputed commerce was interstate and not intrastate, as held by the Public Service Commission and by the District Court.

Hanley vs. Kansas City Southern Railway Co., 187 U. S. 617, 47 L. ed. 333;
Western Union Telegraph Company vs. Speight, 254 U. S. 17, 65 L. ed. 104;

Missouri Pacific Railroad Company vs. Stroud, 267 U. S. 404, 69 L. ed. 683;
Roundtree vs. Terrell, 22 F. Supp. 297;
Lord vs. Steamship Co., 102 U. S. 541.

(a) All such disputed shipments crossed the state line into Kansas.

(b) Reasons of business necessity were given for the entry into the Kansas depot or terminal, thus refuting a charge of subterfuge inferred solely from the more favorable interstate rate.

(c) The **physical facts** give character to interstate shipments distinguishing them from intrastate shipments. **Motives controlling those facts** have no bearing on the question. Especially is this true as to motives which are reasonable.

(d) The Commission's Rule 44 does not apply to any of appellant's disputed operations. Its only legitimate purpose was to prohibit shipments originating in Missouri and billed interstate, from terminating in Missouri en route.

A broader construction of the rule impinges upon the Congressional definition of "interstate commerce." (Motor Carrier Act, 1935; U. S. C. A. Title 49, Sec. 303 (a), par. 10.)

(e) The court abused its discretion in finding that appellant's disputed operations were mere subterfuge to favor his patrons with a lower rate, in the face of undisputed evidence of good business reasons for such operations. This inference of bad faith, if ever such operations were suspicious, should vanish in the light of such reasons.

(f) It is an erroneous conclusion of law that an applicant for an interstate permit must, in order to obtain it, waive questions of constitutionality of the conditions here imposed.

Frost vs. Railroad Commission of California, 271 U. S. 583; 46 S. Ct. 685;
Abie State Bank vs. Bryan, 282 U. S. 765; 51 Sup. Ct. 252.

It follows from these considerations that the disputed transactions were interstate in character, and permissible under appellant's interstate permit (absent the question of violation of police regulations), and the refusal of the court

to enjoin arrest and prosecution for engaging therein was an abuse of judicial discretion.

III.

The counterclaim interposed by the Public Service Commission in this case should have been dismissed by the District Court because it wholly fails to comply either with general legal principles governing counterclaims or with Equity Rule 30 of this court in particular.

57 Corpus Juris, p. 366;

Powell, et al. vs. United States, 300 U. S. 276; 57 Sup. Ct. 470, 477;

Equity Rule 30, 28 U. S. C. A. Title 28, sec. 723;

American Mills Co. vs. American Surety Co., 260 U. S. 360; 43 Sup. Ct. 149;

Cleveland Engineering Co. vs. Galion D. M. Truck Co., 243 Fed. 405.

(a) Since the state treasurer and not the Public Service Commission of Missouri is authorized to collect any fees due the state of Missouri for the use of the highways, the Public Service Commission of Missouri can no more maintain a counterclaim for the collection of such fees than it could maintain an independent suit against appellant for their collection, because it is not the real party in interest in such an action.

Laws of Missouri, 1931, pages 311-313, sec. 5272 (See Appendix).

(b) Since the recovery of fees for the use of the highways by any party would be an action at law, this counterclaim clearly fails to comply with that provision of Equity Rule 30 which authorized counterclaims which might be the subject of an independent suit in equity. It is also defective in this respect because it is not supported by any independent jurisdictional ground.

Cleveland Engineering Co. vs. Galion D. M. Truck Co., supra.

(c) Since the transaction which was the subject of the original action was the revocation of appellant's interstate permit and the consequent threatened arrest and prosecution of appellant for operating without such permit, while the transaction which was the subject of the counterclaim was the use of the highways by appellant, the counterclaim did not comply with that provision of Equity Rule 30 which authorizes counterclaims arising out of the transaction which is the subject matter of the original suit. It is also defective in this connection because such counterclaim would be legal whereas the rule requires an equitable counterclaim.

American Mills Co. vs. American Surety Co., supra.

ARGUMENT

ON THE MOTION TO DISMISS

First Ground

If we understand correctly the first contention of appellee's Motion to Dismiss, it is this: There are other reasons than Rule 44 that prompted the Commission to revoke the interstate permit, and since appellant calls attention only to Rule 44 in his statement of jurisdiction, that rule is not "dispositive of the case."

We interpret this as a contention that if the Commission had other reasons than Rule 44, and appellant has not called attention to them in his jurisdictional statement, the consequence is that he "does not preserve for the consideration of the Court those matters of fact and law * * *" for review.

There seems to be two answers to this contention: First, the jurisdictional statement does not perform the function of an assignment of errors. If the statement convincingly shows a justiciable question for this court it has performed its function, and nothing is lost by failure to argue the case in detail therein. Second, it is the **action** of the Commission—not the **reasons that prompted the action**—that is claimed to be unconstitutional and without authority.

There is one more observation by way of answer: If it were true as a matter of law as stated by appellee (and its legal truth is denied) "that there was evidence in abundance to sustain its (the court's) finding that the character of the commerce involved was intrastate and not interstate," of what significance is that? The Commission is not thus empowered to prohibit those transactions which are admittedly interstate in character, albeit it may punish for operating intrastate without an intrastate permit. Consequently, the Commission could not, without exceeding its powers, make the order complained of.

Second Ground

Appellee contends there is no final judgment from which an appeal can be taken. This contention fails in the light of the law and the facts. A permanent injunction was uncondi-

tionally denied. Section 380, Title 28, U. S. C. A. provides for an appeal from the judgment of a statutory court of three judges in such circumstances.

Judgment on the counterclaim was also final. The act of ascertaining the amount due was a ministerial act in fulfillment of that judgment.

Smith vs. Vulcan Iron Works, 165 U. S. 518, 17 S. Ct. 407;
McGourkey vs. Toledo & Ohio Ry. Co., 146 U. S. 536; 13 Sup. Ct. 170;
3 Corpus Juris, pp. 448, 449.

Furthermore, the question of the court's consideration of the counterclaim is one of jurisdiction. Under Equity Rule 30, the trial court was without jurisdiction to entertain, in a suit in equity, a counterclaim involving matters that are collateral to the equitable remedy sought, especially, as in this case, where no right or authority is shown to maintain the claim in a separate action for that purpose.

ON THE MERITS

This case is presented for review upon three principal points:

First, The Commission had no constitutional authority to revoke appellant's interstate permit.

Second, If the disputed acts of transportation are interstate in character, the Commission had no constitutional authority to arrest and prosecute appellant for engaging therein, absent violations of Missouri state police regulations.

Third, The District Court, by reason of Equity Rule 30, had no jurisdiction to entertain the counterclaim as an issuable pleading in this, an equitable action, for the reason that the claim involved a demand for money based upon considerations collateral to the injunctive relief sought, and for the further reason that the Commission had no authority to maintain the claim in a separate suit for that purpose.

We shall attempt to argue these points in their named order.

I.

On the Authority to Revoke the Interstate Permit

We present for the consideration and review of this point, the following bald questions: May a state regulatory body,

in its attempt to exercise its admitted jurisdiction, wield a weapon authoritatively entrusted only to a federal regulatory body? Specifically, may a state, in order to assure itself that no intrastate commerce shall be carried on unlawfully, prohibit all commerce, both intrastate and interstate? May a state arrest and prosecute appellant for engaging in admittedly interstate transactions of commerce, because perchance, he has also carried on some intrastate transactions?

This last sentence is not to be taken as an admission that the disputed transactions are, in fact and law, intrastate in character. As defined by the decisions of this court, they are not. (**See Missouri Pacific Railway Company vs. Stroud, 267 U. S. 404, and Western Union Telegraph Company vs. Speight, 254 U. S. 17.**) As defined in the Motor Carrier Act of 1935, they are not. (**See U. S. C. A. Title 49, Sec. 303 (a), par. 10.**) But the right of revocation does not rest upon the character of the disputed transactions. It goes far beyond that. If the transactions in dispute were ever so clearly of an interstate character, the question here raised is, by what right does the state, through its regulatory body, assume to arrest and prosecute one for engaging in interstate commerce except in the exercise of its police power thereunder? The question is here raised, may a state by withholding a permit for the latter, or by withdrawing one previously granted, effectively prohibit the exercise of the privilege absolutely? We think not. For the right to deny a privilege implies the right to grant it. Here, the source of the privilege is not in the state.

The consequence of the majority opinion is wholly to deprive appellant of his privilege to transport shipments in interstate commerce through Missouri, even such as may be destined to his terminals in Wichita, Kansas; Des Moines, Iowa, and Burlington, Iowa. It is not alone a question of equity, but one of power and authority of the Commission, which, if not derived from proper constitutional legislative authority, cannot be invested by a decree of a court. A necessary implication of the decision is that the state may prohibit commerce that is admittedly interstate because, forsooth, there has been **some** unlawful shipments in intrastate commerce. If this is the meaning of Rule 44 of the Commission, or any statute under which the Commission purports to act, such rule or statute is unconstitutional and void.

In **Buck vs. Kuykendall**, 267 U. S. 307, 45 Sup. Ct. 324, a

statute of the state of Washington prohibited common carriers for hire from using the highways over regular routes without having first obtained a certificate of public convenience and necessity. Plaintiff was denied such a permit to operate as an interstate carrier and his application for an injunction was denied by a statutory three-judge court. On appeal to the Supreme Court of the United States, the court, in an opinion by Mr. Justice Brandeis said (l. c. 315, 316):

> " * * * It may be assumed that section 4 of the state statute is consistent with the Fourteenth Amendment; and also, that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the commerce clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Compare Michigan Public Utilities Commission vs. Duke, No. 283, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed.—decided January 12, 1925. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of the federal action — the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the state of Oregon had issued its certificate which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. **Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden, but to obstruct it. Such state action is forbidden by the commerce clause.** It also defeats the purpose of Congress, expressed in the legislation giving federal aid for the construction of interstate highways."

The sentences emphasized in the above quotation are applicable to the facts here. The view of the Florida Supreme Court relating to the power of the state in this matter is expressed in **Florida ex rel. Motor Co. vs. Florida R. R. Commission,** 166 South 840, as follows:

> " * * * the statutory requirement of a certificate of public convenience and necessity for an exclusively interstate motor carrier operation was in legal effect nothing more than a requirement for registration of such an operation for the purpose of identifying it as such and applying to it the state's mileage tax charge for use of the highways and the state police regulations pertaining to such operations as a means of promoting the public safety, and that being such, every application for exclusively interstate operation of a motor carrier was grantable to the applicant under the Florida statute as a matter of course after a reasonable opportunity had been afforded to the Railroad Commission to investigate and determine its bona fides and identify as an operation that was in truth and in fact exclusively interstate in character."

Supporting this line of reasoning is the case of **Southwestern Greyhound Lines vs. R. R. Commission,** 99 S. W. (2d), 263, 268, 109 A. L. R. 1235, wherein the court construed the Federal Motor Carrier Act of 1935 as follows:

> "An analysis of the act clearly shows that it was the purpose of Congress, in enacting this law, to delegate to the Interstate Commerce Commission the exclusive authority to pass upon the application of a motor carrier engaged exclusively in interstate commerce on the highways for a certificate of public convenience and necessity. Such construction of the law does not deprive the state from protecting its highways and the public safety by reasonable and uniform regulations, and exacting reasonable compensation for the use of such highways. Michigan Public Utilities Commission et al. vs. Duke, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445, 36 A. L. R. 1105; Buck vs. Kuykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286. * * *"

To the same effect are the decisions to be found in annotations as follows: 36 A. L. R. 1110; 38 A. L. R. 291; 47 A. L. R. 230; 49 A. L. R. 1203; 62 A. L. R. 52; 85 A. L. R. 1136.

Acceptance of Permit Did Not Constitute a Waiver of Constitutional Rights

The trial court erred in ruling that appellant, by his acceptance of the interstate permit upon the conditions therein imposed, waived his right to challenge the constitutional validity of Rule 44, and the validity of the action of the Commission thereunder. The court's position seems to be predicated upon the proposition that appellant, having accepted the permit upon the conditions imposed, is bound by these conditions regardless of the constitutional authority to impose them. This is not the law. A distinction must be made between permits or licenses which **confer a right,** and those which merely **regulate** it. In the one case the source of the right is in the licensing authority, and being the source, it may confer it upon condition or withhold it altogether. In the other case the source of the right is elsewhere, but may be regulated by an inferior licensing authority.

Federal constitutional privileges are not granted by a state or any of its agencies. Nor can they compel these privileges to be foresworn as a condition to regulation, though regulation must be submitted to. If, in submitting to regulation (admittedly compulsory) one must surrender constitutional privilege (non-compulsory), how can it be said that the surrender is voluntary? And, if involuntary, how can there be a waiver?

This question is settled in **Frost vs. Railroad Commission of California,** 271 U. S. 583; 46 S. Ct. 685, l. c. 607:

> "May it stand in the conditional form in which it is made here? If so, constitutional guarantees so guarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. * * * In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden."

The court has found as a matter of law that appellant has violated the express terms of his permit. Even if this were true now, which we do not concede, it could not have been stated categorically as a fact prior to the filing of the opinion. The extreme remedy of revocation was invoked for an act the consequences of which could not have been foreseen, and in the contrary seems to be justified in the light of judicial decisions and the Motor Carrier Act. How can appellant be said to have waived that which he could not foresee? Appellant had the right to assume that a sovereign state will not seek to impose unconstitutional conditions.

The thought is well expressed in **Abie State Bank vs. Bryan,** 282 U. S. 765, 776; 51 Sup. Ct. 252, l. c. 257:

> "The principle that a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory, carries with it the recognition of the fact that earlier compliance with the regulation does not forfeit the right of protest when the regulation becomes intolerable."

II.

The Disputed Acts of Commerce Were Interstate in Character; Hence, the Court Should Have Enjoined Arrest and Prosecution

It is appellant's contention, however, that every part of his operations were interstate in character and that the court should have enjoined arrest and prosecution for engaging in the disputed transactions. Equity does not do things by halves. In order that full justice may be done to appellant, his claimed status as an exclusively interstate carrier should be determined in this case. He has not sought an intrastate permit nor does he desire to engage therein unlawfully. He claims, however, the right to do the things complained of under his interstate permit. Appellant is entitled **first** to know if his interstate permit was wrongfully revoked, **second** to know if, under an interstate permit, he is wrongfully engaging in the disputed transactions. Unless these two points be decided together in this case the entire remedy sought in applicant's petition will not be afforded. It therefore becomes necessary to determine the character of the commerce in dispute.

Long before the Motor Carrier Act of 1935 exclusive jurisdiction over interstate commerce was in the Federal government. That act is merely the machinery for exercising that power. Thus Congress has definitely defined what acts shall be considered as interstate commerce in the very field with which we are concerned. In doing so it has merely followed what has long been the accepted definition of the term. The route which the shipment actually travels has always been the determing factor. In the case of **Hanley vs. Kansas City Southern Ry. Co.**, 187 U. S. 617, l. c. 620, the court cites with approval 9 Sawyer 258 in which it is said:

> "To bring the transportation within the control of the state, as a part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state."

The same rule was applied by the Supreme Court in **Lord vs. Goodall,** N. & P. SS. Co., 102 U. S. 541, where it was held that a shipment by sea between two ports in the same state, which is made in part upon the high seas, is foreign commerce and beyond the power of the state to regulate.

Again in 1935 this court decided the very question here involved in holding that transportation from a point in Missouri to another point in Missouri over a route partly within and partly outside of Missouri is interstate commerce. **(Mo. Pac. Ry. Co. vs. Stroud,** 267 U. S. 404.) In that case it appeared that the carrier had two routes by which freight might move between two points within the state, one wholly within the state, and the other partly through another. It was shown that a shipment between these points would, following the carrier's practice, pass over the latter route. In consequence of this the court held that the character of the commerce was interstate. In the instant case the appellant's business practice made it impossible to confine his route entirely within the state of Missouri. As was aptly said by the dissenting judge below, "It is not usual for freight to be thrown off a train between stations although the consignee lives between them."

In **Western Union Telegraph Co. vs. Speight,** 254 U. S. 17, this court considered a situation analogous to that presented here. The court in an opinion written by Mr. Justice Holmes, said (l. c. 18):

"The message was from Greenville, North Carolina, to Rosemary in the same state, and was transmitted from Greenville through Richmond, Virginia, and Norfolk, to Roanoke Rapids, the delivery point for Rosemary. This seems to have been the route ordinarily used by the company for years and the company defends on the ground that the message was sent in interstate commerce and that therefore a suit could not be maintained for mental suffering alone. * * * The jury found that the message was sent out of North Carolina into Virginia for the purpose of fraudulently evading liability under the law of North Carolina and gave the plaintiff a verdict. The presiding judge then set the verdict aside 'as a matter of law' and ordered a nonsuit. But on appeal the Supreme Court of the State set aside the nonsuit and directed that a judgment be entered on the verdict.

"We are of opinion that the judge presiding at the trial was right and that the Supreme Court was wrong. Even if there had been any duty on the part of the telegraph company to confine the transmission to North Carolina it did not do so. **The transmission of a message through two states is interstate commerce as a matter of fact.** (Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333) **The fact must be tested by the actual transaction.** (Kirkmeyer v. Kansas, 236 U. S. 568, 572, 35 Sup. Ct. 419, 59 L. Ed. 721. * * * The court below did not rely primarily upon the finding of the jury as to the purpose of the arrangement but held that when, as here, the termini were in the same state the business was intrastate unless it was necessary to cross the territory of another state in order to reach the final point. This, as we have said, is not the law. * * * * " (Emphasis ours.)

In **Roundtree vs. Terrell,** 22 F. Supp. 297, the court held that where a carrier transports shipments by truck from Dallas, Texas, to his terminal in Texarkana, Arkansas, and later, by means of his local delivery truck transported it back across the state line into Texarkana, Texas, was engaged in interstate commerce. The circumstances in that case were identical in every material respect with those in this case, and the Federal District Court for the northern district of Texas came to a conclusion opposed to the conclusion reached in this case.

Hence we submit that as a matter of law the movement of freight in the manner of the circumstances of this case constitutes interstate commerce, and was so held to be long before the Motor Carrier Act of 1935. Subsequent to the passage of that act there can be no doubt of the character of the commerce. Congress has clearly defined interstate commerce by motor vehicles and placed such commerce under the sole jurisdiction of the Interstate Commerce Commission and this definition is in harmony with all the prior definitions of the courts.

The Charge of Subterfuge is Refuted By Evidence of Business Convenience

Appellant established his Kansas City, Kansas, terminal at the beginning of his operations as a motor carrier. It is the only terminal which appellant ever had in this area and was so located prior to the promulgation by any legal authority of tariffs affecting either interstate or intrastate carriage of property. This seems to be a complete answer to a charge that the terminal was located in Kansas in order to afford appellant's patrons the lower interstate rate. There were sound business reasons for so locating it. His office and terminal were in a large building with convenient facilities for loading and unloading trucks, parking trucks, handling freight and otherwise transacting a trucking business. In the same building there were several other non-competing carriers with whom inter-line connections were established for the transportation of freight. The location was in close proximity to large shippers of freight by truck, and in fact these shippers were largely instrumental in inducing the appellant to choose this location as one most convenient for all concerned. The very same considerations that induced the location in Wichita, Kansas; Des Moines, Iowa, and other terminals were employed in locating the terminal at Kansas City, Kansas. It was so located at a time when there were no established rates, either intrastate or interstate, by regulatory authority; consequently, there is no justification for an inference that the decision on the location was induced in order to afford appellant's patrons the benefit of the interstate rate.

Under the Federal Motor Carrier Act of 1935 a carrier engaged in interstate commerce is required to charge the rate on file with the approval of the Interstate Commerce Commission, and if such rate is not charged he subjects himself to

fine and imprisonment as set out in the Federal Motor Carrier Act. This case develops that if there is a difference in the interstate and intrastate rate and the carrier complies with the Federal Act and charges the federal interstate rate his certificate may be revoked, as in this case, because he charges a different rate. The reason given by the Commission in revoking his certificate was that shippers in using his service between St. Louis, Missouri, and Kansas City, Missouri, via his terminal in Kansas City, Kansas, were afforded a lower freight rate than the rate established by the Public Service Commission on intrastate traffic. This the court believed was a subterfuge.

The character of the "pick-up" and "delivery" service employed at the Kansas City, Kansas, terminal differed in no respect from the service employed at other terminals. In every case the shipments traversed the entire distance between terminals. It was necessary for it to do so in order that all matters pertaining to billing, checking, loading and unloading, weighing, classifying, making inter-line connections, making collections, etc., may be performed. Yet, with all of the legitimate reasons for conducting the business in the manner described, the court found that the disputed transactions were subterfuges to afford patrons the benefit of the lower rate, when as a matter of law the Interstate Commerce Commission is directed to fix the rates. It is earnestly contended that this was an abuse of judicial discretion on the part of the court, in view of controlling decisions of this court (see Missouri Pacific R. R. Co. vs. Stroud, 267 U. S. 404, and Western Union Telegraph Company vs. Speight, 254 U. S. 17).

The Physical Facts Determine the Character of the Commerce

But regardless of motive, the trial court was bound by the facts in the case, for it is the facts, and not the motive which characterizes the commerce. This is clearly shown to be the ruling of this court from the excerpts taken from the last two cases above cited. It is likewise written into the Congressional definition of "interstate commerce" as follows:

> "(10) The term 'interstate commerce' means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor ve-

hicle or partly by motor vehicle and partly by rail, express or water." (Motor Carrier Act 1935, U. S. C. A. Tit. 308 (a), Par. 10.)

For the foregoing reasons it is earnestly contended that the trial court should have permitted itself to be governed by the actual facts that transpired in the course of the commerce even though it may have believed that the Commission's Rule 44 was being violated, for the reason that said rule must give way to the Congressional definition in all respects in which it conflicts.

Commission's Rule 44, Reasonably Interpreted, Does Not Apply to the Disputed Transactions

This point is ably dealt with in the dissenting opinion. The only legitimate purpose of Rule 44 was to prohibit shipments originating in Missouri and billed interstate, from terminating in Missouri en route. A broader construction of the Rule would, to the extent that it conflicts with the congressional definition, render it invalid. Only that construction should be placed upon it which would give it validity as a law.

If the first sentence of the rule means literally what it says, then clearly it conflicts with the Federal statute. For that statute states that commerce "between places in the same state through another state" is interstate commerce. The majority opinion states this does not describe a situation where the carriage is "merely over a state line and immediately back again." But in the quoted decisions of this court, the situation was just that. And if just consideration is given to the reasons why it was so, there is no occasion for the charge of subterfuge.

III.

On the Counterclaim

We earnestly contend that the counterclaim filed in this case by the Public Service Commission wholly fails to comply with the prerequisite of a proper counterclaim, either under Equity Rule 30, or general legal principles governing counterclaims. We believe that the first and absolute requirement of any counterclaim is that it must represent some claim of the defendant in the principal cause of action against the plaintiff. It can never be the basis of asserting some claim

which some other person, not a party to the principal suit, might have against the plaintiff. In other words, the party who interposes a counterclaim should be the real party in interest in that action just as the plaintiff in the original action must be in the real party in interest in the original complaint. In 57 C. J., p. 366 a counterclaim is defined:

> "It is substantially a cross action by defendant against plaintiff, and secures to defendant the full relief which a separate action at law, a bill in chancery, or a cross bill would have secured him on the same state of facts. * * * It is defined judicially as a cause of action in favor of defendant upon which he might have sued plaintiff and obtained affirmative relief in a separate action. * * *"

The State Treasurer Alone is Authorized to Sue for the Fees.

The counterclaim shows on its face that a right of the state of Missouri and not of the defendant Public Service Commission is being asserted. The counterclaim states that the Public Service Commission files this counterclaim against plaintiff "for fees owing by plaintiff to the state of Missouri" and prays the court "to provide the means whereby the amount of moneys owing by plaintiff to the state of Missouri may be equitably and accurately determined." Thus it becomes apparent that the right attempted to be asserted by the Public Service Commission against the plaintiff is one which belongs solely to the state of Missouri. Furthermore, the lower court in its conclusions of law does not find otherwise. The court found (Record, page 66). "That the plaintiff is indebted to the state of Missouri for license fees and charges accumulated since the granting of a temporary restraining order in this case, and the state is entitled to judgment, therefor." However, in its decree the court rules (Record, page 81) "That the defendants are entitled to recover on their counterclaim from the plaintiff on behalf of the state of Missouri certain license fees and other charges accruing during the pendency of this suit and the effective period of the temporary injunction." But upon what authority did the court rule that the defendant Public Service Commission was entitled to recover "on behalf of the state of Missouri?" We have been unable to find any statute which provides for the collection

by the Public Service Commission of fees owing to the state of Missouri by motor carriers operating over the highways of Missouri. In **Laws of Missouri**, 1931, pp. 311-313, Sec. 5272, it is provided that such fees shall be collected by the state treasurer of the state of Missouri. Therefore, if plaintiff owes fees for the use of the highways of the state he owes them to the State Treasurer, and not to the appellee Public Service Commission. It follows that since the Public Service Commission could not maintain an action against the plaintiff for such fees it cannot interpose a counterclaim for their collection in this cause.

Equity Rule 30 is Violated by the Action of the Court in Entertaining the Counterclaim

But let us assume for the moment that the Public Service Commission could maintain such a suit. The counterclaim filed in this case would still be fatally defective because it utterly fails to comply with the requirements of Equity Rule 30 of this court. Under this rule the defendant must interpose a "counter-claim arising out of the transaction which is the subject matter of the suit," and may interpose a "counter-claim against the plaintiff which might be the subject of an independent suit in equity against him." It is evident that the counterclaim in question does not fall within the latter class. Aside from the fact that the matter raised could not be the subject of any suit by the Public Service Commission as pointed out above, the recovery of fees certainly could not be made the subject of an independent suit in equity. In any event a suit for the recovery of fees would necessarily be an action at law.

But there is still another reason why this counterclaim could not fall under the latter class mentioned in the rule. There would be no independent federal jurisdiction to support it. In **Cleveland Engineering Co. vs. Galion D. M. Truck Co.**, 243 Fed. 405, 407, the principle is thus stated:

> "It is true that a set-off or counterclaim which is the subject of an independent suit in equity can not be sustained, unless some independent ground of federal jurisdiction is shown to support it. The jurisdiction of the court invoked by complainant in its bill, and shown by the allegations thereof, does not aid or support the juris-

> diction of this court when the defendant brings forward a set-off or counterclaim which may be the subject of an independent suit, and which does not merely concern matters already put in litigation by the original bill. It follows, therefore, in that situation, if there is not diversity of citizenship, or if the subject-matter of a counterclaim is not within the jurisdiction of a federal court, the counterclaim should be stricken out for want of jurisdiction. * * * "

Since there would be no ground of federal jurisdiction to support a suit by the Public Service Commission against this appellant for the purpose of collecting fees for the use of the highways, a counterclaim interposed for that purpose must fail for the same reason.

Nor can the counterclaim be justified under the first class set out in the rule. In the opinion of the majority of the lower court it is said that it is doubtful if this counterclaim arose out of the transaction which is the subpect matter of the suit. We contend that the counterclaim clearly does not arise out of the transaction which is the subject matter of the suit. That transaction was the revocation or threatened revocation of appellant's permit to operate as a motor carrier over the highways of the state of Missouri, together with the consequent interference with appellant's operations by state officials. It was to restrain this interference that the injunction suit was instituted. An action to recover fees would arise out of the use of the highways. It is difficult to understand how the withdrawal of the use of the highways and the use of the highways could be considered the same transaction. **Powell vs. United States,** 300 U. S. 276.

The Counterclaim Was Not an Equitable Action, But Was Clearly an Action at Law

But apart from this defect the counterclaim in question does not comply with either requirement of Equity Rule 30 for the reason that it is not equitable in its nature. In **American Mills Co. vs. American Surety Co.,** 260 U. S. 360, l. c. 364 this court construed the rule in the following manner:

> "The petitioner argues that **must** and **may** are here set over against one another for the purpose of enforcing the intention and effect of the rule to require the de-

fendant in an action in equity to set out any counterclaim arising out of the subject-matter of the bill, but to leave it to the option of the defendant whether a counterclaim or set-off not arising out of the same transaction shall be interposed or shall be prosecuted by independent bill. The respondent contends that while this may be correct, the counterclaim growing out of the same transaction must be an equitable claim and not a legal one as here. We concur in this view.

"The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence and by uniting in one action as many issues as could be conveniently disposed of. But they normally deal with subject-matter of which, under the dual system of law and equity, courts of equity can properly take cognizance. They certainly were not drawn to change in any respect the line between law and equity as made by the federal statutes, practice and decisions when the rules were promulgated. * * * The counterclaim referred to in the first part of the paragraph must therefore be an equitable counterclaim, one which like the set-off or counterclaim referred to in the next clause could be made the subject of an independent bill in equity. The counterclaim and the set-off and counterclaim in the two clauses are **in pari materia,** except that the first grows out of the subject-matter of the bill and the other does not. * * * The rule should be liberally construed to carry out its evident purpose of shortening litigation, but the limitation of counterclaims to those which are equitable is imperative."

Since any action for the recovery of fees for the use of the highways would be a legal action it seems evident that the counterclaim in question clearly fails to comply with Equity Rule 30. We submit, therefore, that the majority of the lower court erroneously admitted it as a pleading in this cause.

Counterclaim Should Have Been Dismissed For Want of Jurisdiction

The whole question of the court's jurisdiction to entertain the counterclaim is aptly stated in **Powell et al. vs. United States,** 300 U. S. 376; 57 Sup. Ct. 470, l. c. 477 as follows:

"The counterclaim was not properly before the court and could not be entertained as an incident to or part of the suit to set aside the Commission's order respecting the tariff.

The Seaboard's bill merely assails the Commission's order. The issue between the original parties is confined to its validity. The suit is a statutory one triable only in a specially constituted court. The counterclaim is based on a violation of section 1 (18); the facts alleged are not sufficient to constitute a cause of action within the jurisdiction of that court. **Pittsburg & West Va. Ry. Co. vs. United States,** 281 U. S. 479, 488, 50 S. Ct. 378, 381, 74 L. Ed. 980. Moreover, the counterclaim does not arise out of the transaction that is the subject of the suit and is not germane or related to it. Equity Rule 30 (28 U. S. C. A. following section 723) cannot reasonably be construed to authorize intervening defendants, in a suit to set aside an order of the Commission, to set up counterclaims not arising out of or related to the subject matter of the suit. That would permit complications likely to burden and impede and would be contrary to the purpose and intent of the rule. **Chandler & Price Co. vs. Brandtjen & Kluege, Inc.,** 296 U. S. 53, 59, 56 S. Ct. 6, 8, 80 L. Ed. 39. The counterclaim, not being within the jurisdiction of the specially constituted court, should have been dismissed for want of jurisdiction. **Pittsburgh & West Va. Ry. Co. vs. United States,** ubi supra."

CONCLUSION

We respectfully contend that the District Court abused its scretion in denying the permanent injunction applied for d was without jurisdiction to entertain the counterclaim, r the reasons hereinbefore set forth. The judgment should reversed and the cause remanded with instructions to ter a decree for permanent injunction and to dismiss the unterclaim.

Respectfully submitted,

D. D. McDONALD,
FRANK E. ATWOOD,
SMITH B. ATWOOD,
Counsel for Appellant.

APPENDIX

Rule 44 of the Public Service Commission of Missouri reads as follows:

> "No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier accepts within Missouri a passenger whose destination is beyond the limits of the State of Missouri, such passenger shall not be permitted to terminate his trip within the State of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri."

Section 5267(b), Laws of Missouri, 1931, page 306 reads as follows:

> "The public service commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all motor carriers as herein defined."

Section 5269, Laws of Missouri, 1931, referred to in the opinion of Reeves, J., page 12 of the jurisdictional statement reads as follows:

> "DISCONTINUANCE OF SERVICE—FORFEITURE —SUSPENSION—REVOCATION.—No motor carrier authorized under the provisions of this act to operate within the state of Missouri shall abandon or discontinue any service established under the provisions of this act without an order of the commission therefor, which said order shall be granted only by the commission after hearing upon due notice. The commission may at any time, for good cause, suspend, and upon at least ten days notice to the grantee of any certificate, and an opportunity to be heard, revoke, alter or amend any cer-

tificate issued under the provisions of the act; PROVIDED, that on finding of the commission that any motor carrier does not give convenient, efficient and sufficient service in accordance with the orders of the commission, such motor carrier shall be given a reasonable time, not more than sixty days, to provide such service before any existing certificate is cancelled or revoked or a new one granted to some other motor carrier over the same route."

Motor Carrier Act 1935, U. S. C. A. Tit. 303(a), Par. 10, reads as follows:

"(10) The term "interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water."

Equity Rule 30, U. S. C. A. reads as follows:

"RULE 30. ANSWER — CONTENTS — COUNTERCLAIM.— * * * The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims.

When in the determination of a counterclaim complete relief cannot be granted without the presence of parties other than those to the bill, the court shall order them to be brought in as defendants if they are subject to its jurisdiction. (Amended May 4, 1925.)"

The pertinent points of Section 5272, Laws of Missouri 1931, pages 311-313 are as follows:

" * * * In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 5265 of this act shall, at the time of the issuance of a certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1 and January 15 of each calendar year, pay to the state treasurer of the state of Missouri the annual license fee, as set out in this act, for the maintenance and repair of the public highways; all such fees levied upon the issuance of a license to any motor carrier for any motor vehicle hereunder shall be reckoned from the beginning of the quarter in which such license was issued; * * * "

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

MOTION TO DISMISS.

JAMES H. LINTON,
DANIEL C. ROGERS,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ,

vs.

Appellant,

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

(Filed in United States District Court on July 27, 1938.)

Come now the appellees, by their counsel appearing in that behalf, and move the Court to dismiss the appeal in the above entitled cause, for the reason that this Court does not have jurisdiction thereof.

Suggestions in Support of Appellees' Motion to Dismiss.

The Court should dismiss the petition for appeal for two reasons, as follows:

(1) Because the appellant relies wholly upon the unconstitutionality of Rule No. 44, promulgated by appellee Public Service Commission of Missouri, which is not dispositive of the case;

(2) Because the judgment of the three-judge district court does not constitute a final judgment in said cause.

I.

Appellant's statement of basis of appellate jurisdiction goes only to the constitutionality of Rule No. 44 promulgated by appellee Public Service Commission. From a casual inspection of the opinion and findings of fact and conclusions of law of the three-judge district court it is quite apparent that the determination of the constitutionality of Rule No. 44 is not dispositive of the case. The determination of the constitutionality of the order of the Public Service Commission, effective December 30, 1936, revoking the interstate common carrier authority of the appellant, is dispositive of the case. Rule No. 44 is only one of the fragments of the evidence upon which the aforementioned order of revocation was based. Rule No. 44 is only one of the fragments of the evidence upon which the judgment and decree of the three-judge court were based.

Appellant, therefore, does not preserve for the attention of this Court the question upon which its appellate jurisdiction turns, *i. e.*, the question of the character of the commerce involved. The case turns upon this question only. The opinion of the three-judge court clearly shows that there was evidence in abundance to sustain its finding that the character of the commerce involved was intrastate and not interstate. The three-judge court found that by unlawful manipulations and subterfuges appellant had conducted a motor carrier transportation business between two points in Missouri, namely, St. Louis, Missouri, and Kansas City, Missouri. Although appellant claimed such commerce to be interstate in character, the evidence proved it to be intrastate commerce. The court so found.

The introduction of Rule No. 44 was only a part of the evidence upon which appellees relied to prove the character of the commerce. True it was contended by appellees, and the court so held, that, in view of Rule No. 44, appellant motor carrier was not authorized under his Missouri irregular route interstate permit to pick up freight at one point in Missouri destined to another point in Missouri, even if in so doing he should drive his trucks for a short distance into another State. But, as stated heretofore, the constitutionality of Rule No. 44 is not dispositive of the case.

The three-judge court was within its right to dismiss the temporary injunction upon finding, as it did, that appellant had practiced numerous illegal manipulations and subterfuges in his transportation business in an effort to transform commerce that was truly intrastate in character into commerce that was interstate in appearance only. Therefore, even if the Court should find that Rule No. 44 is unconstitutional, which is not admitted as a fact, it would not reach the vital issues of law and fact upon which the case turns. The vital issues are determined only upon consideration of the constitutionality of the order of the Public Service Commission revoking appellant's authority, and the propriety of the dismissal of his Bill by the three-judge district court. Neither the constitutionality of the Commission's order of revocation nor the sustaining thereof by the lower court was dependent upon Rule No. 44.

In his statement of the jurisdictional grounds of this Court appellant has waived consideration of the order of the Public Service Commission revoking his authority. He stakes his case on the constitutionality of Rule No. 44 only. Since it is so apparent that a review of all of the evidence considered by the three-judge court in dismissing the injunction is essential to the determination of the issues involved, the appeal should be dismissed. It should be dismissed

because it does not preserve for the consideration of the Court those matters of fact and law which are necessarily dispositive of the case. It would be the doing of a useless thing for the Court to pass upon the constitutionality of Rule No. 44 only, since it is so obvious that the determination of the constitutionality of Rule No. 44 only is not dispositive of the case.

II.

The appeal should be dismissed for the reason that a final judgment, from which an appeal can be taken, has not been entered by the three-judge district court. Appellee Public Service Commission filed a counterclaim. The three-judge court has taken jurisdiction thereof and has assigned it to a special master for hearing. The issues thereon to be determined are judicial in character. The trial of the issues under the counterclaim will consist of the introduction and consideration of evidence to determine the amount of fees, for the use of the public highways of Missouri, payable by appellant to the State of Missouri during the period of time which the temporary injunction was in effect. These issues will be tried as a suit in equity and the amount of fees owing by appellant to the State of Missouri will be determined upon a judicial consideration of Sections 5264-5279, both inclusive, page 304, Laws of Missouri, 1931. Fees owing to the State of Missouri under the counterclaim are owing to it because the Federal court by its temporary injunction permitted, in effect, appellant to use the highways of Missouri without compensation therefor until the temporary injunction is dissolved. Stated another way, the court restrained the State from enforcing its order of revocation of appellant's irregular route interstate permit. Hence, the cause of action under the counterclaim is one in equity arising out of the transaction which is the subject matter of the suit.

The determination of the amount due the State of Mis-

souri under the counterclaim is a judicial question inseparable from the issues involved in the bill of complaint. Therefore, there is not a final judgment from which an appeal can be taken until the issues under the counterclaim are judicially determined. The Court will not allow an appeal by piecemeal.

Appellees respectfully submit that the appeal, for the foregoing reasons, should be dismissed.

JAMES H. LINTON,
General Counsel;
DANIEL C. ROGERS,
Assistant Counsel,
Missouri Public Service Commission,
Solicitors for Appellees.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 367.

FRANK EICHHOLZ, Appellant,
vs.
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF ON BEHALF OF APPELLEE, PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI.

JAMES H. LINTON,
General Counsel,
DANIEL C. ROGERS,
Assistant Counsel,
Attorneys for Appellee, Public Service Commission of the State of Missouri, Jefferson City, Missouri.

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 367.

FRANK EICHHOLZ, Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ROY McKITTRICK, Attorney-General of the State of Missouri, and B. M. CASTEEL, Superintendent of State Highway Patrol, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF AND ARGUMENT OF APPELLEE.

Official Report of Decision Under Review.

The decision of the three-judge district court is reported in 23 Federal Supplement, at page 587.

Statement of Grounds of Jurisdiction.

Appellee has complied with Paragraph 1 of Rule 12 of this court in respect to jurisdiction by means of a separate printed motion to dismiss, in which it was urged, principally, there is no final judgment.

STATEMENT OF THE CASE.

Appellant, Frank Eichholz, made application for and was granted an "irregular route" interstate permit on November 23, 1934, by the Public Service Commission of the State of Missouri. The essential provisions of that permit are as follows:

Appellant's Interstate Permit.

"For authority to operate interstate as a freight carrying motor carrier over an *irregular route* as follows: From all points in Missouri to points beyond the State and from points beyond Missouri to all points within the State, exclusively in interstate commerce." (Emphasis ours.)

From the aforesaid 23rd day of November, 1934, until appellant's interstate permit was revoked by the Public Service Commission, Rule No. 44 duly promulgated by said Commission was in full force and effect. It provides as follows:

Rule No. 44.

"No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier accepts within Missouri a passenger whose destination is beyond the limits of the State of Missouri, such passenger shall not be permitted to terminate his trip within the State of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri."

Revocation Order, Findings and Conclusions. Appellee Public Service Commission of the State of Missouri, effective December 30, 1936, revoked appellant's interstate permit aforesaid. In its report and order (R 19), appellee found (1) that appellant had been transporting freight between the docks of consignors in St. Louis, Missouri, and docks of consignees in Kansas City, Missouri, and vice versa, in intrastate commerce, under the guise of interstate commerce, in violation of his interstate permit aforesaid, and, (2) that, therefore appellant had also violated the terms of Rule No. 44 aforesaid.

Route Used St. Louis to Kansas City. Freight was hauled daily by appellant from St. Louis, Missouri, across the state over U. S. Highway No. 40 through Kansas City, Missou

(R 93) to the Mid-Central Terminal, less than one-half mile across the state line, (R 93), in Kansas City, Kansas, and thence back into Kansas City, Missouri. Appellant had continued such practice (R 89) since securing his interstate "irregular route" permit from the State of Missouri on November 23, 1934.

State Permits Not Held. Appellant has never had authority to operate as an intrastate motor carrier in Missouri (R 89). The Mid-Central Terminal of Kansas City, Kansas, has never had any authority (R 91), either interstate or intrastate, to operate as a motor carrier in Missouri.

Bill In Equity Filed. Appellant, on December 31, 1936, filed a bill in equity (R 1) and applied for and was granted a temporary restraining order to protect himself and drivers against appellee and certain other state officials whom he alleged were threatening to arrest and prosecute criminal actions against himself and his drivers (R 7). A three-judge court granted a temporary injunction (R 48).

Hearing and Decree. Thirteen months after the temporary restraining order was issued, the three-judge district court heard the matter on the merits, namely, on January 31, 1938. After hearing the evidence, including pertinent evidence concerning the character of appellant's operations between the two Missouri cities since issuance of the revocation order by the appellee, the district court on May 10, 1938, filed its decree (R 81), whereby appellant's bill in equity was dismissed and the temporary injunction was dissolved.

Findings and Conclusions. Its findings of fact (R 64) and conclusions of law (R 65) uphold in every particular those contained in the report and order of the Public Service Commission whereby appellant's interstate permit was revoked.

Counterclaim and Ruling Thereon. At the trial on the merits, Public Service Commission presented a counterclaim (R 52). The district court found in paragraph IV of its conclusions of law (R 66) that appellant was indebted to the State of Missouri for license fees and charges accumulated since the granting of the temporary restraining order, and that the State is entitled to judgment therefor. In its decree (R 81), the district court appointed a special master

". . . . . to take an accounting of such accrued and accumulating license fees (fol. 113) and other legal charges if any, and report same to this court with his findings of fact and conclusions of law. And the court hereby reserves jurisdiction of the cause till all questions arising on the counterclaim have been determined."

The Issues. Appellant contends as follows:

(1) that the true character of the freight which he has hauled between docks of shippers in St. Louis, Missouri, and docks of consignees in Kansas City, Missouri, through the Mid-Central Terminal in Kansas City, Kansas, and thence back into Missouri, is interstate commerce;

(2) that the commerce clause of the Federal Constitution and the definition of interstate commerce in the Federal Motor Carrier Act of 1935, excuse him from violations of the terms of his interstate permit granted by appellee, and from violations of the terms of Rule No. 44 promulgated by appellee;

(3) that a final judgment has been entered on the counterclaim and that the act of ascertaining the amount due from him to the State of Missouri for the use of its highways during the period of more than sixteen months the temporary injunction was in effect is a ministerial act (Br. 14);

(4) that, notwithstanding the admission by him of the fact that he is indebted to the State of Missouri for such moneys, the district court had no right to take jurisdiction of such counterclaim, first, because it was presented and urged by the Public Service Commission of the State of Missouri, and, second, because it is one not within the purview of Equity Rule No. 30.

Appellee contends as follows:

(1) that the commerce in dispute was intrastate commerce;

(2) that appellant's hauling of intrastate commerce constituted a violation of his interstate permit;

(3) that, even if the freight hauled from St. Louis, Missouri, to Kansas City, Missouri, and vice versa, was, as a matter of law, interstate commerce, such hauling constituted a violation of Rule No. 44, and was therefore unlawful;

(4) that upon the face of appellant's bill and evidence all of his haulings upon the public highways of Missouri were over "regular routes," and were therefore illegal because his interstate permit did not authorize him to use Missouri highways in interstate commerce over "regular routes";

(5) that appellant was not in "bona fide operation" as a common carrier by motor vehicle over U. S. Highway No. 40 between St. Louis, Missouri, and Kansas City, Missouri, or over any other highway route in Missouri, on and subsequent to June 1, 1935, as required by Section 206-(a) of the Federal Motor Carrier Act, 1935;

(6) that appellant could not lawfully operate intrastate without complying with Section 5268-(a) of the Missouri Bus and Truck Act;

(7) that the Public Service Commission acted within its constitutional rights in revoking appellant's interstate "irregular route" permit.

SUMMARY OF ARGUMENT.

The argument herein is presented under headings, as follows:

I. ON THE MERITS.

1. **Appellant refuses to do equity.** He admits he owes fees to the State but has persistently refused to pay them either to the Public Service Commission or the State Treasurer.

2. **Appellant not in "bona fide" operation.** Since he owes fees to the State for use of its highways by seventy (70) trucks for sixteen (16) months, the reasonableness of which has been adjudicated by prior court decision, appellant is not in "bona fide" operation as contemplated by the Federal Motor Carrier Act, 1935.

   McDonald vs. Thompson, 83 L. Ed. l. c. 169 (Advance Opinions).

   Moreover, having admitted that the Mid-Central Terminal of Kansas City, Kansas never at any time obtained a permit to operate in Missouri, appellant was likewise not in "bona fide" operation in his agency connection with the terminal which owed fees to the State of Missouri.

   McDonald vs. Thompson, 83 L. Ed. l. c. 169 (Advance Opinions);
   State ex rel. Illinois Greyhound Lines, Inc. vs. Public Service Commission, 108 S. W. (2d) 116.

3. **Appellant violated his "irregular route" permit.** Appellant held authority to operate in Missouri only over "irregular routes." He violated that authority by engaging in an intensive "regular route" use of Missouri highways. He was therefore not in "bona fide" operation, as required by the Federal Motor Carrier Act. Having disqualified himself as an interstate operator under the Federal act, he should not be per-

mitted to invoke the protection of that act as a shield against the consequences of his violations of state transportation laws.

South Carolina State Highway Dept. vs. Barnwell Bros., 82 L. Ed. 734;
McDonald vs. Thompson, 83 L. Ed. 168 (Advance Opinions).

4. **Rule No. 44.** Under this rule, which had the force and effect of law, appellant was prohibited from carrying freight from a point in Missouri to a point in Missouri in interstate commerce in the manner practiced. His permit also excluded such an operation. He accepted both and is therefore bound by their terms.

State v. Dixon, 73 S. W. (2d) 385;
Midland Realty Co. v. Kansas City P. & L. Co., 300 U. S. 109, 81 L. Ed. 540.

Rule No. 44 served useful purposes, among them disruption of rate structures. Such control of a motor carrier is not a burden on interstate commerce such as is prohibited either by the Federal Motor Carrier Act, 1935, or the Commerce Clause.

Stone v. Farmers Loan & Tr. Co., 116 U. S. 307;
Minnesota Rate Cases, 230 U. S. 352;
South Carolina State Highway Dept. vs. Barnwell Bros., 303 U. S. 177, 82 L. Ed. 734;
Kelly v. Washington, 302 U. S. 1, 82 L. Ed. 3.

5. **Character of the Commerce.** The facts in each case govern. The facts here show decided departures from rules pertaining to interstate commerce in hauling between St. Louis and Kansas City and vice versa. Appellant indulged in numerous practices of soliciting, billing, delivery, and going direct from shipper to receiver, by means of an unnecessary dart into Kansas City, Kansas, which constitute a movement of freight by subterfuge.

Cases of similar facts are as follows:

Interstate Busses Corp. v. Holyoke Street R. Co., 273 U. S. 45;
Sprout v. City of South Bend, 277 U. S. 163;
Chicago, Milwaukee & St. P. R. Co. v. Pub. Serv. Comm., 269 Mo. 63;
B. & O. R. Co. vs. *Settle*, 260 U. S. 166;
C., M., & St. P. & P. R. Co. v. Campbell River Mills Co., 53 F. (2d) 69;
Arkansas R. Comm. v. C., R. I. & P. R. Co., 274 U. S. 597;
Roundtree vs. Terrell, 22 Fed. Supp. 297.

II ON THE COUNTERCLAIM

1. **Equity Rule No. 30.** No objection was made to filing counterclaim and none should be raised now. It is within the provisions of the first division of Equity Rule No. 30 because appellant created the cause of action in the counterclaim when he sought to enjoin enforcement of order of Public Service Commission revoking his interstate permit.

   Frank Moore vs. New York Cotton Exchange, 270 U. S. 593, 70 L. Ed. 750.

2. **Appellee is the proper collecting agent.** Statutes so provide, and because statutes governing State Treasurers' duties do not provide for that officer to maintain this counterclaim. Appellant has conceded Public Service Commission is proper agent of the State of Missouri to whom to pay the fees, by his voluntary statement that he tendered fees owing by him to the State to the Public Service Commission.

ARGUMENT.

I. ON THE MERITS.

Appellant Refuses To Do Equity. *Appellee expresses the* conviction that upon consideration of equitable principles alone the judgment and decree of the District Court should be affirmed.

It may readily be determined upon a casual inspection of the face of the record in this cause that appellant owes the State of Missouri a large sum of money for license fees, as provided by Section 5272 of the Missouri Bus and Truck Act, Laws of Missouri, 1931, pages 304-316, inclusive, for the use of its public highways by approximately seventy vehicles which he admits were operated over Missouri highways in interstate commerce for the period of sixteen months commencing on December 31, 1936, and ending on May 10, 1938, being the period of time appellee and other officers of the State of Missouri were restrained by the District Court. Appellant has at all times failed and refused to pay to the State of Missouri such fees. For that failure he advances such unfounded reasons as that the District Court, under Equity Rule No. 30, did not have jurisdiction of the counterclaim, or, that the Public Service Commission is not a proper agency of the State of Missouri to maintain the cause of action pleaded in the counterclaim. If both contentions of appellant were true, he would, nevertheless, as a matter of equity, be guilty of a failure to do equity to the State of Missouri in his persistent refusal to pay into the state treasury the statutory fees which he admits he owes to the State. He seeks equity of the State, but refuses to do equity to the State.

Appellant Not in "Bona Fide" Operation. (1) As hereinafter more particularly set out, appellee contends that, as a matter of law, it is the proper agent of the State of Missouri to maintain the cause of action pleaded in the counterclaim for the collection of fees owing by appellant to the State of Missouri. It also contends that the District Court rightfully took jurisdiction of the counterclaim under the provisions of

Equity Rule No. 30. If these contentions are sustained to the satisfaction of the court, it seems quite clear that appellant stands before the court either in violation of equitable principles or at least as one who operated during the aforesaid period of sixteen months in defiance of the aforesaid Section 5272 of the Missouri Bus and Truck Law pertaining to annual license fees.

Therefore, having operated his approximately seventy vehicles upon and over the public highways of the State of Missouri for a period of sixteen months in defiance of the aforesaid section of the Missouri Bus and Truck Law pertaining to annual license fees, appellant was not in "*bona fide*" operation as a common carrier by motor vehicle, as provided by Section 206-(a) of the Federal Motor Carrier Act.

In the case of McDonald vs. Thompson, 83 L. Ed. l. c. 169 (Advance Opinions), the court said:

> "The question first to be decided is whether his claim of bona fide operation is well founded."

In the McDonald case the question under consideration was whether the State of Texas could, under its police power, deny McDonald's application on the ground that the proposed operations would subject the highways named in it to excessive burden and endanger and interfere with ordinary use by the public. McDonald claimed there, as Eichholz claims here, that, pending determination of his application for a certificate of convenience and necessity before the Interstate Commerce Commission, he was authorized to continue operations. The court held that,

> "Plainly the proviso does not extend to one operating as a common carrier on public highways of a State in defiance of its laws."

Section 5272 of the Missouri law is not questioned by appellant here. Indeed, the annual license fees provided by Section 5272 of the Missouri Act have been upheld in the case of Brashear Freight Lines, Inc., et al. vs. Public Service Commission, et al., 23 Fed. Supp. 865.

Therefore, inasmuch as appellant was operating during the aforesaid period of sixteen months, in defiance of Section 5272 of the Missouri Bus and Truck Act, and still refuses to pay to the State of Missouri the fees which he owes under that section, he was not in "*bona fide*" operation and is, therefore, not entitled to protection in his operation as a common carrier over the public highways of the State of Missouri by Section 206-(a) of the Federal Motor Carrier Act. Neither would the commerce clause of the Federal Constitution protect him against his operations in defiance of proper State laws during the period of sixteen months.

(2) Moreover, appellant states (R 91) that,

"No permit was ever obtained by the operator of the Mid-Central Terminal, and under the law none was necessary."

Appellee concedes it to be a fact that no permit, either interstate or intrastate, was ever obtained from the Public Service Commission by the operator of the Mid-Central Terminal to conduct a motor carrier operation upon the public highways of the State of Missouri. Appellee, however, refutes the suggestion that under the Missouri law no permit was required by the operator of the Mid-Central Terminal to operate its own vehicles or those of appellant between the Mid-Central Terminal in Kansas City, Kansas and docks of shippers in Kansas City, Missouri.

Section 5268-(b) of the Missouri Bus and Truck Act provides as follows:

"It is hereby declared unlawful for any motor carrier except as provided in section 5265 of this act to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the Commission a permit so to do."

Under that provision any operations by the Mid-Central Terminal between Kansas City, Kansas and Kansas City, Missouri were illegal. Nor was it exempted from the above provision either under Section 5265 or Sections 5264-(b) and (e).

In the case of State ex rel. Illinois Greyhound Lines, I vs. Public Service Commission, 108 S. W. (2d) 116, the preme Court of the State of Missouri held that the operat of an interstate bus line which originated in Chicago, Illin and terminated in St. Louis, Missouri, at a distance of o 3.18 miles from the point where it entered the State of M souri, was amenable to the provisions of the Missouri Bus Truck Act and was required by Section 5272-(a) to one-third of the annual license fees mentioned in Section 52 (c) of the Missouri Bus and Truck Act.

It follows, therefore, that appellant did at all times eng and use the services of the Mid-Central Terminal in violat of and in defiance of the Missouri Bus and Truck Act. He at no time has he been in *"bona fide"* operation, as provi by Section 206-(a) of the Federal Motor Carrier Act. C sequently, he is not entitled to claim protection against revocation of his authority by the State of Missouri eit under the provisions of the Federal Motor Carrier Act or Commerce Clause. Having no protection under Federal l appellant must submit to State authority to revoke for g cause the permit granted to him by the State to use its pu highways.

Appellant Violated His "Irregular Route" Permit. though the question of appellant's operations over "regu routes" was not directly discussed either in the report order of the Public Service Commission or in the opin of the District Court, nevertheless, the order of the Comm sion, the findings of the District Court and the stateme of the evidence plainly reveal that appellant has engaged intensive "regular route" operations over the public highw of the State of Missouri.

"Regular" and "irregular routes" are defined in Sect 5264, Laws of Missouri, 1931, pages 304-316, inclusive, follows:

> "(g) The term 'regular route,' when used in this means that portion of the public highway o which a motor carrier usually or ordinarily oper or provides motor transportation service."

"(h) The term 'irregular route,' when used in this act, means that portion of the public highways over which a regular route has not been established."

Appellant applied for and was granted (R. 93) an "irregular route" interstate permit. He was therefore under obligation to operate as an "irregular route" interstate carrier, whereby he was privileged to transport freight, "over an irregular route,"

> "From all points in Missouri to points beyond the State and from points beyond Missouri to all points within the State, exclusively in interstate commerce."

Obviously the admission by appellant that his road haul trucks made approximately one hundred thirty (130) trips per month over U. S. Highway No. 40 between St. Louis, Missouri and Kansas City, Kansas is an admission that he adopted U. S. Highway No. 40 across the State of Missouri as a "regular route." Moreover, appellant concedes in the statement of the evidence (R. 96) that he made application to the Interstate Commerce Commission for "regular route" operations over Missouri highways.

Therefore, it is urged that appellant has long since repudiated the "irregular route" permit issued to him by the State of Missouri, and has operated over "regular routes" instead. He has never had a permit to operate over "regular routes" in Missouri.

The states have control over their highways for safety purposes. Among numerous cases announcing such a policy, the following are directly in point:

South Carolina State Highway Dept. vs. Barnwell Bros., 82 L. Ed. 734;

McDonald vs. Thompson, 83 L. Ed. 168 (Advance Opinions).

If interstate motor carriers can repudiate "irregular route" permits issued to them by the Public Service Commission under the protection of the Federal Motor Carrier Act or the Commerce Clause, unlimited numbers can with

impunity engage in "regular route" operations upon t principal highways of the State. They could so cro Missouri's principal highways as to create dangerous tra hazards. It is unthinkable that the states could thu be so completely displaced with respect to the police cont of their public highways.

Hence, it is the contention of appellee that appella has for a long time been operating in violation of his int state permit in that he has operated over "regular route instead of "irregular routes." The issuance of "irregul route" permits serves to distribute traffic. "Regular rout operations, if too numerous, tend toward congestion of traf

In the interest of safety, the Public Service Commissi is entitled to know when an interstate operator wishes to u "regular routes." Upon proper application therefor "regul routes" can be authorized, if public safety will not be jeop dized thereby, but no operator may legally apply for and ceive an "irregular route" interstate permit and thereaf wilfully engage in a "regular route" operation. Such an ope tion is not a "bona fide" one.

Rule No. 44 Discussed. Section 5276 of the Misso act under consideration provides that,

> "The orders and decisions of the Public Serv Commission on the matters covered by this act shall reduced to writing and a copy thereof, duly certifi shall be served on the motor carrier and contract hau affected thereby through the United States mail. . . .

It is taken for granted, therefore, that the Commission p formed its duty under Section 5276 and served a copy of R No. 44 on appellant as prescribed.

Appellant, therefore, at all times knew of the restrictio placed upon his operations by Rule No. 44. He voluntar accepted it. He is estopped to complain against it. T rule very plainly indicates that appellant could not p up freight at docks of consignors in St. Louis, Misso transport it across U. S. Highway No. 40 through Kan City, Missouri to the Mid-Central Terminal located one-h mile across the state line and thence transport such freig back into Kansas City, Missouri to docks of consigne

The rules of the Public Service Commission have the same force and effect as laws enacted by the legislature.

State v. Dixon, 73 S. W. (2) 385;
Midland Realty Co. v. K. C. Power & L. Co., 300 U. S. 109, 81 L. Ed. 540.

In its report and order (R. 30) the Public Service Commission recognized the fact that appellant had not only violated the express terms of Rule No. 44, but that he also had violated the express terms of his interstate permit. The permit itself provided that he was possessed of authority to operate interstate as a freight-carrying motor carrier over an "irregular route" as follows:

> "From all points in Missouri to points beyond the state and from points beyond Missouri to all points within the state, *exclusively* in interstate commerce."

There is no reason for construction of either the interstate permit possessed by appellant or Rule No. 44. The language of each is plain and unambiguous. The terms of each clearly prohibited appellant from hauling freight between docks of consignors in St. Louis, Missouri and docks of consignees in Kansas City, Missouri by the way of the one-half mile route into Kansas City, Kansas and thence back into Missouri.

It is apparent that appellant commenced hauling freight between the two Missouri cities in the manner heretofore described, at a freight rate one-third (33⅓%) lower than the intrastate freight rate fixed by the Public Service Commission of Missouri, for the primary purpose of taking the cream of the movement of intrastate freight between the two Missouri cities away from intrastate common carriers authorized to operate over "regular routes." He probably conceived that it would be impossible for him to prove convenience and necessity under Section 5268 of the Missouri Bus and Truck Act for an intrastate operation between the two Missouri cities. He knew that under the provisions of Section 5277 of the Missouri act he was not entitled to "grandfather" rights. Therefore, he chose to take the risk of getting a considerable volume of the freight movement between the two

Missouri cities in the manner indicated herein. His hook-u at Kansas City, Kansas was with a terminal company whic at no time possessed legal authority to transport freigh between Kansas City, Kansas, and Kansas City, Missouri

Obviously, it was the policy of the State not to permit us of its highways for an operation in interstate commerce whic included within the State both the point of origin and point o destination of the property to be transported. Both th permit and Rule No. 44 exclude such an operation. Suc policy permitted the State to control disruption of rate struc tures and to control undue disadvantages and preferences i intrastate commerce. Such policy gave the State better con trol over evasive instrumentalities like commercial moto vehicles.

It was this situation of disruption of rate structur and numerous other matters of vital local concern with whic Public Service Commission was confronted when it adopted th policy of restricting motor carriers with interstate permi to the use of Missouri highways only from points in Missou to points in other states, and vice versa, and promulgate Rule No. 44 in conformity therewith.

Appellant was well acquainted with this policy of th State of Missouri. By willful repudiation of it he has not on violated that policy, but has inflicted irreparable injury upo intrastate competitors who are helpless to defend or prote themselves. If these competitors were ever legally at liber to commence a so-called interstate operation between S Louis, Missouri and Kansas City, Missouri, via one-half mi in Kansas, for any reason real or pretended, that door w closed to them on June 1, 1935 by the terms of the Feder Motor Carrier Act.

Section 5267-(c) of the Missouri Bus and Truck act pr vides as follows:

> "All laws relating to the powers, duties, authori and jurisdiction of the Public Service Commission ov common carriers are hereby made applicable to all su motor carriers, except as herein otherwise specifica provided."

By reference to the general act creating the Missouri Public Service Commission in the year of 1913, there appears the following:

> "Sec. 5154. *Unreasonable Preference.*—No common carrier shall make or give any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It was to prevent the occurrence of situations mentioned in Section 5154 that prompted the Public Service Commission to promulgate Rule No. 44.

In Stone v. Farmers Loan & Trust Co., 116 U. S. 307, at page 334, Chief Justice Waite, speaking for the Court, said:

> "It" (the State of Mississippi) "may, beyond all question, by the settled rule of decision in this Court, regulate freights and fares for business done exclusively within the State, *and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi.*" (Emphasis ours.)

It was said by the Supreme Court of the United States in Minnesota Rate Cases, 230 U. S. 352, l. c. 402:

> " . . . . there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. . . . . .
>
> . . . . . Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the

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subject is preculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

In conclusion, it is contended that Rule No. 44 was controlling against Appellant in his use of those highways in the performance of a so-called interstate business which inflicted injury upon intrastate competitors.

Congress has not entered the field so as to deprive the State of its authority to say whether or in what manner its highways may be used.

Kelly v. Washington, 302 U. S. 1, 82 L. Ed. 3.

The State is free to control its highways and the traffic thereon if such is not a burden on interstate commerce. Such principle is clearly endorsed in the case of

South Carolina State Highway Department et al. v. Barnwell Brothers et al., 303 U. S. 177, 82 L. Ed. 734.

"Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or

any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse.

From the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected. Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 416, 57 L. Ed. 1511, 1548, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. Congress not acting, state regulation of intrastate carriers has been upheld regardless of its effect upon interstate commerce. Id. With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce."

Character of the Commerce. It may be of convenience the Court if evidence pertaining to the character of the mmerce, as gleaned from the report and order of the Public rvice Commission, the opinion and findings of fact of the strict Court, and statements of evidence submitted by unsel, is segregated as follows:

(R 21) The Mid-Central Terminal at Kansas City, ansas, had no authority to transport property as a motor rrier into the State of Missouri.

(R 21) Appellant "filed" a so-called interstate tariff th the Interstate Commerce Commission.

(R 21) Some shippers knew of, others never heard of e Mid-Central Terminal.

(R 22) The manager of the Mid-Central Terminal testid that shipments originating in Kansas City, Missouri, des-

tined to St. Louis, Missouri, would frequently show the Mid-Central Terminal of Kansas City, Kansas, as the "shipper." When such freight was picked up in Kansas City, the bills of lading indicated that the freight was to be delivered in St. Louis, Missouri.

(**R 23**) Prior to April 1, 1936, as testified to by the Terminal manager, he collected a charge for his services in addition to the interstate freight rate, and that two sets of bills of lading were for a time used in connection with shipments of freight through his terminal between Kansas City, Missouri, and St. Louis, Missouri.

(**R 25**) All packages of freight were marked or stencilled with the name and destination of the St. Louis, Missouri, or Kansas City, Missouri, consignee. Numerous witnesses so testified.

(**R 26**) Some St. Louis shippers did not know that the freight was to move through Kansas City, Kansas. Contact was made with appellant and no contact whatsoever was made with the Mid-Central Terminal.

(**R 27**) Some St. Louis shippers did not know until the day of the hearing before the Public Service Commission that appellant stamped on bills of lading the words, "Riteway Motor Service via Kansas City, Kansas." One witness explained that two sets of bills of lading were used, one evidencing a contract of transportation from St. Louis, Missouri, to Kansas City, Kansas, and another from the Mid-Central Terminal to Kansas City, Missouri. This was done, he said, with a view of conformity to an interstate transaction. Such practice was discontinued upon information received by witness that it was no longer necessary.

(**R 28**) Appellant himself testified that he assumed responsibility for delivery of freight between St. Louis, Missouri, and Kansas City, Missouri, and that he paid the Mid-Central Terminal for all services rendered by it on his behalf.

(**R 32**) The so-called interstate tariff "filed" with the Interstate Commerce Commission quoted rates on various classes of goods between St. Louis, Missouri, and Kansas City, Kansas. It quoted the same rates between St. Louis, Missouri, and Kansas City, Missouri, with the words "interstate only"

in parenthesis. This so-called interstate tariff was regarded by the Public Service Commission as "a badge of fraud."

(R 32) The Public Service Commission found that,

". . . . . respondent has unlawfully engaged in intrastate commerce, that his transportation of intrastate shipments across a state line was a subterfuge and a fraud, that the facts determine the true character of the business in which he was engaged, ..."

(R 33) The Commission further stated:

"The violations of respondent are flagrant. The evidence shows that he is actively acquisitive and yields easily to temptation; that he has intentionally exceeded his authority; that he has violated the law and the rules of the Commission; and that he is guilty of a misdemeanor and subject to a fine or imprisonment under the applicable penal statute. Section 5275, Laws of Mo., 1931, page 314. A withdrawal of authority heretofore granted respondent appears to be fully justified and the Commission finds that his existing permit should be revoked."

(R 55) In its opinion the District Court stated that at the hearing on the temporary injunction it appeared that only a "small percentage" of freight was handled between St. Louis, Missouri, and Kansas City, Kansas, and vice versa, and that its temporary injunction was for "judicial convenience." The Court further stated that by "inference" evidence of appellant tended to prove that he selected a terminal site one-half mile across the state line in Kansas City, Kansas, because it was in the vicinity of large shippers.

(R 56) The court decided that at least forty (40%) per cent of the freight moving across Missouri on U. S. Highway No. 40 was intrastate in character.

(R 59) The court held that the route traveled and methods employed were neither normal nor natural. Such practice was not a matter of convenience either to the shipper or carrier. It found that immediately upon arrival of truckloads of freight at the terminal it was in some instances transported

back into Kansas City on the same vehicle and over the same routes and was immediately delivered in Kansas City, Missouri.

(R 61) Again the court stated that appellant intended that an "inference" should be drawn from his evidence that terminal headquarters were in Kansas City, Kansas, because of the nearness of shippers. It found, however, that the pick-up and delivery zone with a radius of twenty-five (25) miles does not sustain appellant's contentions. The court found that the location of the terminal in Kansas City, Kansas, and the twenty-five (25) mile zone was a "device" by means of which appellant could carry intrastate shipments between St. Louis, Missouri, and Kansas City, Missouri, and thereby extend to the shippers an interstate rate far below intrastate rates promulgated and approved by the Missouri Public Service Commission.

(R 89) Appellant's statement of the evidence concedes that he never sought or obtained an intrastate permit.

(R 91) It also concedes that the Mid-Central Terminal did not have a permit of any kind to operate as a motor carrier in Missouri.

(R 93) The statement of appellee reveals that appellant applied for and was granted an "irregular route" permit and that he operated approximately one hundred thirty (130) truck trips per month between his St. Louis, Missouri, and Kansas City, Kansas, terminals.

(R 94) The Supervisor of the Bus and Truck Department of the Missouri Public Service Commission, who was familiar with the exhibits applicant placed in evidence with the Interstate Commerce Commission, testified that not less than forty (40%) of freight moving over U. S. Highway No. 40 originated at and was destined to one of the two Missouri cities.

(R 94) Appellant maintained a first-class freight rate between the two Missouri cities of sixty cents (60c) per CWT. This was the rate which he "filed" with the Interstate Commerce Commission. The duly promulgated intrastate rate was ninety-two cents (92c) per CWT on first-class freight between the same two Missouri cities

(R 95) Numerous witnesses testified they did not know until the day of the hearing that their freight was handled through a terminal at Kansas City, Kansas, and that they did not direct appellant as to the routing; that appellant's solicitor urged them to use his trucks between the two cities because of his substantially cheaper interstate freight rates.

(R 95) The operator of the terminal testified that large quantities of freight originating in St. Louis, Missouri, were billed to the terminal in Kansas City Kansas, as consignee. Thereafter, such shipments were billed and transported to the true consignees in Kansas City, Missouri. He testified that shipments between St. Louis, Missouri, and destinations in Kansas or Colorado were not so handled. Full trailer loads of freight billed from a single consignor in St. Louis, Missouri, to a single consignee in Kansas City, Missouri, were driven through Kansas City, Missouri, to the terminal in Kansas City, Kansas. Sometimes these full trailer loads were unloaded at the terminal and thence transported back into Kansas City, Missouri, by means of "delivery" trucks. Sometimes these full trailer loads were driven immediately back into Missouri and unloaded at the docks of consignees. The terminal operator testified that such was the usual practice on full trailer loads.

(R 96) On the night of February 1, 1938, inspectors of the Public Service Commission made an effort to determine the true character of the commerce being handled by appellant over U. S. Highway No. 40. Eight Westbound transport trucks of appellant were inspected at scales of the Missouri State Highway Commission at a point on U. S. Highway No. 40 a short distance east of Kansas City, Missouri. Six of the eight trucks were destined to the terminal in Kansas City, Kansas. Two were destined for Wichita, Kansas. Only one of the drivers of these eight trucks would show the inspector his freight bills. The other drivers refused. The inspected truck carried a straight truck load of freight originating in St. Louis, Missouri, which was destined to a consignee at North Kansas City, Missouri. It was driven through Kansas City, Missouri, to the terminal in Kansas City, Kansas. The inspector saw that same trailer load of freight unloaded at

docks of consignee in North Kansas City, Missouri. Another truck was followed with similar results.

(R 96) Appellant concedes that he has applied to the Interstate Commerce Commission for authority to engage in interstate commerce over "regular routes" between his various terminals, using Missouri highways. His evidence supporting such application was presented to the Interstate Commerce Commission during the month of July, 1937.

It is the contention of appellee that the foregoing evidence, segregated for the convenience of the court, shows that the character of the freight which appellant transported from docks of shippers in St. Louis, Missouri, to docks of consignees in Kansas City, Missouri, was intrastate. Realizing that the question of determining whether freight is interstate or intrastate in character is dependent upon the facts in each particular case, appellee submits the foregoing extracts of the evidence as a fair cross-section of it.

Since certain facts pertaining to the character of the commerce were so exclusively within the knowledge and possession of the appellant, appellee filed a motion (R 52) asking for the appointment of a special master. It was the conception of appellee at that time that an intensive investigation of appellant's operations would be required to determine beyond a possibility of doubt the amount of freight that was actually moving between docks of consignors in St. Louis, Missouri, and docks of consignees in Kansas City, Missouri, and vice versa, and the character of that movement. The trial court, however, heard the case itself. Appellee's investigations were somewhat curtailed as compared with an investigation which might have been conducted before a special master.

Nevertheless, it seems there can be no doubt but that there was a large volume of freight moving between the two Missouri cities in the manner heretofore described. It appears that the trial court believed that appellant endeavored to conceal the actual facts concerning the character and quantity of freight moving between the two Missouri cities. It is a fact that on the night state inspectors stopped part of appellant's trucks, seven of them refused to show their freight bills. Two of the eight told inspectors that they were going to

Wichita, Kansas. The freight bills of the single truck which was inspected revealed that the truck contained a full load of merchandise for Kansas City, Missouri. Is it not plausible that the drivers who refused inspection of their freight bills and cargo might also have been hauling merchandise billed to Kansas City, Missouri? Inspectors actually saw two of these full truck loads go through Kansas City, Missouri, to the terminal one-half mile over the line in Kansas City, Kansas, and thence within a very short time go back into Kansas City, Missouri, where their cargoes were unloaded. The drivers knew the inspectors were watching them. All eight of them had been stopped at the scales. One might indulge in the inference that all eight of the truckloads were destined to Kansas City, Missouri, and that all eight of them would have gone directly to docks of consignees in Kansas City, Missouri, without the sham of the unnecessary trip into Kansas City, Kansas, except for the fact that the drivers knew they were being watched. The three-judge court no doubt gave careful consideration to the probative value of the evidence.

The following quotation from the case of Interstate Busses Corp. v. Holyoke Street R. Co., 273 U. S. 45, 71 L. ed. 530, is pertinent in the instant case:

> "*The burden is upon appellant* to show that enforcement of the Act operates to prejudice interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers *without license* over that part of its route which is parallel to the street railway.
>
> * * * * * * * * *
>
> It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses *used exclusively for that purpose* or that appellant's interstate business is dependent in any degree upon the local business in question. *Appellant may not evade the Act by the mere linking of its intrastate transportation to*

its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees.

* * * * * * * * * * *

There is no support for the contention that the enforcement of the Act deprives it of its property without due process of law. *Undoubtedly, the State has power in the public interest reasonably to control and regulate the use of its highways so long as it does not directly burden or interfere with interstate commerce.* (Citing cases) The terms of the Act are not arbitrary or unreasonable. *Appellant has not applied for and does not show that it is entitled to have a license from the local authorities or a certificate of public necessity and convenience from the department.* Plainly, it has no standing to attack the validity of the statute as a violation of the due process clause."

In the case of Sprout vs. City of South Bend, 277 U. S. 163, l. c. 168, the Court said:

"He made stops habitually at points within Indiana in order to permit passengers from South Bend to leave the bus before the state-line was reached. The legal character of this suburban bus traffic was not affected by the device of requiring the payment of a fare fixed for some Michigan point or by Sprout's professing that he sought only passengers destined to that State. *The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce.*"

If the actual facts govern, it would seem that, in the instant case, the Court will find the commerce is intrastate. Appellant knew both the intention of the carrier and the destination of the freight.

For other leading cases supporting the authority of the state where the character of the commerce was similar to the commerce described in this record, reference is made to the following:

Detroit-Cincinnati Coach Lines vs. P. U. C. of Ohio, 119 Ohio 324;
Inter-City Coach Company vs. Atwood, 21 F. (2d) 83, 85;
Blackmore vs. P. S. C., 183 Atl. 115;
Clark vs. Poor, 274 U. S. 554.

In the case of State ex rel. C., M. & St. P. R. Co. vs. P. S. C., 269 Mo. 63, it was held that grain shipped from Missouri points to Kansas City, Missouri, is intrastate and the "holding" of the cars on siding in Kansas for the convenience of the railroad company is no authority for the carrier to charge interstate rates. It is very apparent in the instant case that plaintiff, for no other reason than for the purpose of deliberately changing the character of the commerce, takes large quantities of Missouri shipments through Kansas. See also the case of Bishop vs. St. L. & S. F. R. Co., 54 S. W. (2d) 480, where transportation of cattle into Kansas without the knowledge or consent of plaintiff was made by defendant on its own volition. Since the actual route was wholly within Missouri, the court held the commerce to be intrastate.

It was held in the case of B. & O. R. Co. vs. Settle, 67 L. Ed. 189, 260 U. S. 166, that, when it is admitted that a shipment from one state into another was originally intended for the point which it ultimately reached, *the intention governs the rate to be paid*, and not the mere facts of the presence or absence of through billing, continued possession by carrier, or unbroken bulk, which are without legal significance. The instant case is quite similar to the Settle case because both shippers and plaintiff intended that the ultimate destination of shipments should be in Missouri; yet the freight was unnecessarily carried into Kansas and thence into Missouri for no other purpose than to allow the shipper to avail himself of a cheaper, unregulated interstate rate, and to allow the carrier the resulting benefit over intrastate carriers by means of an unregulated so-called interstate haul.

In the case of C., M. St. P. & P. R. Co. v. Campbell River Mills Co., 53 F. (2d) 69, 73, the court announced the following rule:

> "Assuredly, if there is any serious doubt as to whether the shipment was interstate, this doubt should be resolved in favor of the intrastate character of the transaction: 'The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power.'"

Arkansas Railroad Commission et al., v. Chicago, Rock Island & Pacific R. Co., 274 U. S. 597, 603, 47 S. Ct. 724, 726, 71 L. Ed. 1224.

The judgment of the lower court is affirmed.

The only motor carrier case relied upon by appellant in his claim that the freight transported between docks of consignors in St. Louis, Missouri and docks of consignees in Kansas City, Missouri was interstate in character is that of Roundtree v. Terrell et al., 22 Fed. Supp. 297. The Roundtree case is easily distinguishable from the instant case.

First. The opening paragraph of the opinion states that,

> "Prior to the passage of the Federal Motor Carrier Act, on June 13, 1934, the Railroad Commission of Texas *issued him an interstate certificate authorizing him to transport*, interstate commerce, *over Texas highways between Fort Worth and Texarkana.*"

As to the use of the Texas highways, the State of Texas had specifically authorized Roundtree to operate over them "between Fort Worth and Texarkana." In other words, the State itself had authorized him to conduct an interstate business over a "regular route" between Fort Worth, Texas and Texarkana. Furthermore, he later made application to the Interstate Commerce Commission for authority to operate in interstate commerce over this identical "regular route."

Appellant in the instant case did not have any "regular route" authority whatsoever to operate between St. Louis,

Missouri and Kansas City, Kansas in interstate commerce over U. S. Highway No. 40; nor did he have "irregular route" authority for operation between two points in Missouri. So far as appellant's operation between St. Louis, Missouri and Kansas City, Missouri, via the terminal in Kansas City, Kansas, is concerned, appellant commenced such operation subsequent to or on the date of April 1, 1936. In the Texas case the plaintiff at all times possessed state authority for the use of the Texas highways. Consequently, the use of the Texas highways was not a point in issue in the Roundtree case.

Second. There is also a differentiation between the two cases on the question of the character of the commerce. In the instant case it was shown that full truck loads of freight from St. Louis, Missouri, consignors to Kansas City, Missouri, consignees go to or near the terminal in Kansas City, Kansas, and are from there returned in the same trailer to the dock of the consignee in Kansas City, Missouri. No such evidence of this character appears in the Texas case. Further, the evidence in the instant case shows numerous attempts on the part of appellant, who in many instances is aided by the shippers, deliberately to handle the St. Louis, Missouri, to Kansas City, Missouri, shipments in such manner as to evade the rules of billing and hauling applicable to it.

Third. There was no showing in the Texas case that intrastate commerce was being discriminated against by the operations of Roundtree. Discrimination is a question of importance in the case before this Court.

II. ON THE COUNTERCLAIM

Equity Rule No. 30. The counterclaim was deposited with the clerk (R. 52) on February 2, 1938, the same day on which the injunction suit was tried on the merits. In its opinion filed on March 24, 1938, the District Court indicated for the first time that it would take jurisdiction of the counterclaim. In its decree filed on May 10, 1938 Jay M. Lee of Kansas City, Missouri (R. 81) was appointed special master to hear the counterclaim.

On the question of the filing of the counterclaim (R. 62) the District Court said:

"No objection having been made to the filing of the counterclaim, this court will not interpose one under the circumstances of the case. The question having been presented, it should be considered by us."

Appellant contends that the counterclaim is not within the provisions of Equity Rule No. 30.

In the case of Frank Moore vs. New York Cotton Exchange, 270 U. S. 593, 70 L. Ed. 750, the court upheld jurisdiction of a counterclaim under similar circumstances, as follows:

"2. Equity Rule 30 in part provides:

'The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and the cross claims.'

Two class of counterclaims thus are provided for: (a) One 'arising out of the transaction which is the subject matter of the suit,' which must be pleaded, and (b) another 'which might be the subject of an independent suit in equity,' and which may be brought forward at the option of the defendant. We are of opinion that this counterclaim comes within the first branch of the rule; and we need not consider the point that, under the second branch, Federal jurisdiction independent of the original bill must appear, as was held in Cleveland Engineering Co. v. Galion Dynamic Motor Truck Co. (D. C.), 243 Fed. 405, 407.

The bill sets forth the contract with the Western Union and the refusal of the New York Exchange to allow appellant to receive the continuous cotton quotations, and ask a mandatory injunction to compel appellees to furnish them. The answer admits the refusal and justifies it. The counterclaim sets up that, nevertheless, appellant is purloining or otherwise illegally obtaining

them, and asks that this practice be enjoined. 'Transaction' is a word of flexible meaning It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim. Compare Xenia Branch Bank v. Lee, 7 Abb. Pr. 372, 390-394. And see generally, Cleveland Engineering Co. v. Galion Dynamic Motor Truck Co., supra, p. 408 (243 Fed.); Champion Spark Plug Co. v. Champion Ignition Co. (D. C.), 247 Fed. 200, 203-205.

So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter; but the relief afforded by the dismissal of the bill is not complete without an injunction restraining appellant from continuing to obtain by stealthy appropriation what the court had held it could not have by judicial compulsion."

It is the conviction of appellee that its counterclaim clearly falls within that class of counterclaims "arising out of the transaction which is the subject matter of the suit." It is suggested by appellee that the "transaction" out of which the counterclaim arose was the Commission's order of revoca-

tion. Appellant created the cause of action expressed in t counterclaim by attacking that order of revocation. Even the court does not agree that the relation of the "transactio and the "counterclaim" are precisely as just stated, it w appreciate the fact that the counterclaim is, nevertheless, o within the provision of the first branch of Equity Rule N 30, if the rule is liberally construed.

Appellee Proper Collecting Agent. Although appella in the Assignment of Errors, on page six of his brief, does n dispute the authority of appellee to maintain an action collect fees due to the State of Missouri under the provisio of the Missouri Bus and Truck Act, he does dispute th authority in argument on page twenty-five of his brief. page twenty-six of his brief appellant states as follows:

> "Therefore, if plaintiff owes fees for the use of t highways of the state, he owes them to the State Tre urer, and not to the appellee Public Service Commissio

It is doubtful that such statement made by appellan consistent with equitable principles. If there is one thing t is beyond doubt, it is that appellant owes the State of Miss fees for the use of its highways upon which seventy (70) of trucks operated for a period of sixteen months. Now he s gests to the court at least a doubt as to whether or not he o fees to the state. He seeks equity, but is not willing to equity.

Appellant suggests that, if he owes any fees, he owes th to the State Treasurer. It will be presumed that if the S Treasurer is the proper agent of the State of Missouri to m tain an action against appellant for fees, he would have since commenced an action against appellant for such In the absence of such an action it should be presumed that State Treasurer is not the proper agent of the state to main such an action.

Section 11425, R. S. Mo. 1929, pertaining to the duti the State Treasurer, reads in part as follows:

> "The state treasurer shall *receive and keep*, as prov by law, all the moneys of the state not expressly requ by law to be received and kept by some other per

disburse the public moneys upon warrants drawn on the treasury according to law, and within the time limited in the Constitution, and not otherwise; keep a just and true account of the funds and the appropriations made therefrom by law, and the disbursements made thereunder."

The state treasurer is the one who "*shall receive and keep,* as provided by law, all the moneys of the state."

The foregoing description of the duties of the state treasurer is wholly consistent with the provisions of Section 5272 of the Missouri Bus and Truck Act, which provides that, annually, all motor carriers shall

"pay to the state treasurer of the state of Missouri the annual license fee, as set out in this act, for the maintenance and repair of the public highways; . . . . . The Commission, upon the issuance of a license for any vehicle, as defined in this act, shall notify the state treasurer who shall receive the license fee for such vehicle; . . . . . ."

Sections 11425 and 5272 are consistent with the policy of the State that the state treasurer shall receive and keep moneys of the state when delivered to him by duly authorized collecting agents of the state.

Section 11465, R. S. Mo. 1929, further shows it to be the policy of the state that the state treasurer is the receiving agent and the state treasury is the depository of state moneys. Such section provides in part as follows:

"All moneys now belonging to or that may at any time hereafter belong to the state, that is now in the state treasury or that hereafter may be required by law to be paid into the treasury for any purpose whatever, shall immediately on receipt thereof be deposited by the treasurer to the credit of the state, for the benefit of the fund to which such moneys respectively belong, ..."

It is suggested, therefore, that there is no merit in t contention of appellant that the state treasurer would be t proper agent of the state to maintain an action against hi for fees, if he owes any.

Moreover, on page four of his brief, appellant states th

> "No injunctive relief was sought to restrain the Sta Treasurer from collecting lawful licenses and oth fees that would accrue during such operations, sa Treasurer being the official designated by statute *receive* such licenses and fees."

This statement is a tacit admission that the state treasurer not the proper agent of the state to maintain an action agai appellant for fees which he owes. Moreover, it is repeat that if appellant contends the state treasurer is the prop agent to whom fees owing by him should be paid, it was h duty long since to have paid them to the state treasurer.

Indeed, appellant admits that the Public Service Co mission is the proper agent to whom he should have paid fe He stated (R 92) as follows:

> "Since that time a tender of the fees was made, b the Public Service Commission refused such tend Consequently, no fees have been paid since the revocati of appellant's permit."

The record discloses that any tender of fees which a pellant may have made to the appellee was made prior to t filing of the counterclaim. Now, even though the distr court has entered a judgment against him on the count claim, he refuses to pay the fees to the agent of the State whom he claims he once tendered fees. If he tendered the it was at a time when the amount thereof due the State wou have been very uncertain. However, the District Co (R 63) gave him an opportunity to negotiate and agree w appellee on the amount of fees owing by him in order to obvi the necessity of appointing a Special Master.

If appellant was willing to do equity, he might at le have tendered fees owing by him to the State Treasurer, t official whom he contends is the proper agent of the State

collect fees owing by him. He could now tender the amount of the judgment on the counterclaim to the State Treasurer. Since he seeks equity, he should be willing to do equity.

Appellant well knows that throughout the time he has operated as a common carrier upon Missouri highways, he has always paid fees as provided by the Missouri Bus and Truck Act to the Public Service Commission, and that he has never paid any fees whatsoever at the office of the State Treasurer.

Section 5267-(a) provides:

> "The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license, supervise regulate every motor carrier in this state . . . . . ."

Section 5268-(b) provides in part as follows:

> "It is hereby declared unlawful for any motor carrier except as provided in section 5265 of this act to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the Commission a permit so to do."

Imposition upon the Commission of the duty to license necessarily implies the duty to collect the license fee. What would be more impractical than the suggestion that the Commission should transmit to the state treasurer information concerning its intentions to issue an annual license or a temporary license, which would serve no other purpose than that of bringing together the treasurer and the motor carrier on the matter of the amount of fees owing by the latter to the former? It is not the intention of the law to set up such an unworkable administration of the Missouri Bus and Truck Act. It is suggested that it was the intention of the Legislature to have the Public Service Commission collect the fees from motor carriers and maintain any action for delinquent fees owing under the law and rules of the Commission.

Section 5268-(b) of the Missouri Bus and Truck Act provides in part as follows:

"PROVIDED that the Public Service Commission may issue temporary permits to interstate carriers without such hearing and notice for occasional trips, not exceeding one in any calendar month. Such temporary permits shall be issued only upon the payment of such fees as may be designated by the Public Service Commission and the making of satisfactory proof that the carrier has in force a liability insurance policy or bond . . . . ."

Section 5272 provides in part as follows:

"In case of emergency or usual temporary demand for transportation, the license fee or (for) additional motor vehicle for limited periods shall be fixed by the Commission in such reasonable amount as may be prescribed by general or temporary order. The Commission, upon the issuance of a license for any vehicle, as defined in this act, shall notify the state treasurer who shall receive the license fee for such vehicle; . . . . . ."

The court may well make the deduction that the Commission, acting under the foregoing authority, has promulgated proper rules setting up license fees collectible by it for vehicles making occasional or temporary trips over the highways of Missouri.

Finally, attention of the court is drawn to the fact that the Attorney General of the State of Missouri was named as a defendant in Appellant's bill praying for an injunction. He not only filed a separate answer for himself, but also one for the State Highway Patrol. The court may well assume that, since the matters in issue received the attention of the Attorney General, he himself decided that the Public Service Commission was the proper agent of the State to maintain the counterclaim against appellant for collection of fees. Otherwise it would have been the duty of the Attorney General to have brought an action on behalf of the State of Missouri in the name of the State Treasurer or the proper collecting agent. Therefore, it is the contention of appellee that it is the proper agent of the State to maintain the counterclaim against appellant for the fees which he clearly owes to the State for the use of its highways in the operation of seventy (70) trucks for a period of sixteen (16) months.

CONCLUSION.

It is respectfully submitted that,

(1) the Court should dismiss the appeal on the equitable principle that appellant has failed to do equity;

(2) the Court should dismiss the appeal because there is no final judgment, or

(3) the Court should affirm the judgment of the District Court wherein the temporary injunction was dissolved and appellant's bill in equity dismissed, and affirm judgment on the counterclaim as determined by the Court in its separate hearing thereon.

Respectfully submitted,

JAMES H. LINTON,
General Counsel,
DANIEL C. ROGERS,
Assistant Counsel,
Counsel for Appellee.

APPENDIX

MISSOURI BUS AND TRUCK LAW

Be it enacted by the General Assembly of the State of Missouri, as follows:

* * * * * *

ARTICLE 8.

Sec. 5264. Definitions.—(a) The term "motor vehicle," when used in this act, means any automobile, automobile truck, motor bus, truck, bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks.

(b) The term "motor carrier," when used in this act, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or

furnishing such transportation service, for hire as a comm carrier. *Provided, however*, this act shall not be so construed to apply to motor vehicles used in the transportation of p sengers or property for hire, operating over and along regu routes within any municipal corporation or a municipal corpo tion and the suburban territory adjacent thereto forming a p of transportation system within such municipal corporation such municipal corporation and adjacent suburban territo where the major part of such system is within the limits of s municipal corporation.

* * * * * * *

(e) The term "suburban territory," when used in t act, means that territory extending one mile beyond the c porate limits of any municipality in this state and one m additional for each 50,000 population or portion thereof. P vided that when more than one municipality is contained wit the limits of any such territory so described, motor carri operating in and out of any such municipalities within s territory shall be permitted to operate anywhere within t limits of the larger territory so described.

(f) The term "public highway," when used in this a means every public street, alley, road, highway, or thoroughf of every kind in this state used by the public, whether actua dedicated to the public and accepted by the proper authorit or otherwise.

(g) The term "regular route," when used in this a means that portion of the public highway over which a mo carrier usually or ordinarily operates or provides motor tra portation service.

(h) The term "irregular route," when used in this a means that portion of the public highways over which a regu route has not been established.

* * * * * * *

Sec. 5265. Exemptions—police control over highways. The provisions of this act shall not apply to any motor vehi of a carrying capacity of not to exceed five persons, or o ton of freight, when operated under contract with the fede government for carrying the United States mail and when the trip provided in said contract; nor to any motor vehi

owned, controlled or operated as a school bus; nor taxicab, as herein defined; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this act shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This act shall not apply to trucks used in work for the state or any civil subdivision thereof.

Sec. 5266. Charges to be just and reasonable.—All charges made by any motor carrier or contract hauler for any service rendered, or to be rendered, in the transportation of persons or property or both shall be just and reasonable and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared unlawful.

Sec. 5267. Power and authority of public service commission.—(a) The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state to fix or approve the rates, fares, charges, classifications, and rules and regulations pertaining thereto; to regulate and supervise the accounts, schedules, service and method of operating of same; to prescribe a uniform system and classification of accounts to be used, which among other things shall set up adequate depreciation charges, and after such accounting system shall have been promulgated, motor carriers shall use no other; to require the filing of annual and other reports and any other data; and to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public.

* * * * * *

(c) All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to all such motor carriers, except as herein otherwise specifically provided.

(d) A motor carrier not operating over a regular route may, within the territory permitted to be served by him, receive persons or property at a point located on a regular route and destined to a point not located on a regular route, and receive persons or property at a point not located on a regular route and destined to points on a regular route.

(e) It shall be unlawful for any motor carrier, except one having a certificate of convenience and necessity authorizing such service, to accept persons or property for transportation from a point on a regular route destined to a point on a regular route, or where through or joint service is being operated between such points, and any motor carrier so offending shall be guilty of a misdemeanor and punished as provided by section 5275 of this act.

Sec. 5268. (a) **Hearing—notice—certificate—interstate permit rules—temporary permits.—It is hereby declared unlawful for any motor carrier to operate or furnish service as a common carrier within this state without first having obtained from the commission a certificate declaring that public convenience and necessity will be promoted by such operation.** The Commission upon the filing of a petition for a certificate of convenience and necessity shall within a reasonable time fix a time and place for hearing thereon. The Commission shall cause a copy of such petition and notice of hearing thereon to be served at least ten days before the hearing upon the officers or owners of every common carrier that is operating or has applied for a certificate of convenience and necessity to operate in the territory proposed to be served by the applicant, and on the city clerk of any city into or through which said motor carrier may desire to operate, and any such common carrier or city is hereby declared to be an interested party to said proceeding and may offer testimony for or against the granting of such certificate, and any other person or persons who might in the opinion of the Commission, be properly interested in or affected by the issuance of said certificate, be by the Commission made a party, and may offer testimony for or against the granting of such certificate. If the Commission shall find from the evidence that public convenience and necessity will be promoted by the creation of the service proposed, or any part thereof, as the

Commission shall determine, a certificate therefor shall be issued. In determining whether or not a certificate of convenience and necessity should be issued, the Commission shall give reasonable consideration to the transportation service being furnished by any railroad, street railroad or motor carrier, and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout twelve months of the year, and the effect which such proposed transportation service may have upon other transportation service being rendered. *Provided, however,* no vested right shall accrue to any certificate of convenience and necessity; *and provided further,* that the issuance of a certificate of convenience and necessity to one carrier shall not prohibit the granting of such certificate to another carrier over the same route if in the opinion of the Commission the public convenience and necessity will be promoted by so doing.

(b) It is hereby declared unlawful for any motor carrier except as provided in section 5265 of this act to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the Commission a permit so to do. The Commission upon the filing of a petition for an interstate permit shall within a reasonable time fix a time and place for a hearing thereon. The Commission shall cause a copy of such petition and notice of hearing thereon to be served upon the secretary of the state highway Commission and upon the proper officer of each municipality maintaining the highway over which proposed interstate permit is desired, and each party so notified is hereby declared to be an interested party to said proceeding and may offer testimony as to the use and regulation of that part of said highway coming under its maintenance and police regulation. In determining whether or not a permit should be issued, the Commission shall give consideration to the kind and character of vehicles permitted over said highway and shall require the filing of a liability insurance policy or bond in some insurance company, association, or other insurer authorized to transact insurance business in this state, in such sum and upon such conditions as the commission may deem necessary to adequately protect the interest of the public in its use of the highway, which liability

insurance shall bind the obligors thereunder to make compensation for injuries to persons or loss of or damage to property resulting from the negligent operation of such interstate motor carriers. *Provided*, that the Public Service Commission may issue temporary permits to interstate carriers without such hearing and notice for occasional trips, not exceeding one in any calendar month. Such temporary permits shall be issued only upon the payment of such fees as may be designated by the Public Service Commission and the making of satisfactory proof that the carrier has in force a liability insurance policy or bond in some reliable insurance company or association or other insurer satisfactory to the Commission and authorized to transact insurance business in this state in such sum and upon such conditions as the Commission may deem necessary to adequately protect the interests of the public in the use of the highways and with due regard to the number of persons and amount of property transported, which liability insurance shall bind the obligors thereunder to make compensation for injuries to persons and loss or damage to property resulting from the negligent operation of vehicles under such temporary permit, and all applicants for such temporary permit shall designate in writing the Secretary of the Public Service Commission as its authorized agent upon whom legal service may be had in all actions arising in this state from any operation of motor vehicles under authority of such temporary permit. The form of and procedure for obtaining such temporary permit shall be prescribed by the Public Service Commission. Such ports of entry or exit may be established by the Commission as in its judgment may be necessary for the proper administration of this act. In the event of the establishment of any port or ports of entry or exit the expense of the establishment and maintenance of each such port shall be paid out of the receipts at each port derived from the sale of temporary permits to interstate carriers.

(c) Where a certificate such as provided for in subsection (a) of this section shall have been issued and thereafter the motor carrier to whom such certificate shall have been issued shall sell, transfer or assign the business, rights and/or assets of such motor carrier, or any part thereof, then and in that

event the said certificate originally issued to such motor carrier, or the part so sold, shall, upon application to the Commission, if the Commission shall be of the opinion that the purchaser thereof is in all respects qualified under the provisions of this act, to conduct the business of a motor carrier within the meaning of this act, be by the Commission transferred to the purchaser and be effective in like manner as though originally issued to such purchaser. *Provided*, no certificate shall ever be allowed a value in any sale or transfer, or assignment of business rights or assets. In the event of such purchase, when there is a consolidation of one or more certificates of convenience and necessity and when through service will be beneficial to the public, such through service may be permitted.

(d) The Commission shall adopt rules prescribing the manner and form in which motor carriers shall apply for certificates and permits required by this act. Among other rules adopted, there shall be rules as follows: (1) Application shall be in writing. (2) Shall contain full information concerning the ownership, financial condition, equipment to be used, and the physical property of the applicant. (3) The complete route over which the applicant desires to operate or the territory which applicant desires to serve. (4) The proposed rates, schedule, or schedules, or time cards of the applicant. (Laws of Mo., 1935, p. 324.)

Sec. 5269. Discontinuance of service—forfeiture—suspension—revocation.—No motor carrier authorized under the provisions of this act to operate within the state of Missouri shall abandon or discontinue any service established under the provisions of this act without an order of the Commission therefor, which said order shall be granted only by the Commission after hearing upon due notice. The Commission may at any time, for good cause, suspend, and upon at least ten days' notice to the grantee of any certificate, and an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of the act; *provided*, that on finding of the Commission that any motor carrier does not give convenient, efficient and sufficient service in accordance with the orders of the Commission, such motor carrier shall be given a reasonable time, not more than sixty days, to provide such

service before any existing certificate is cancelled or revo
or a new one granted to some other motor carrier over the s
route.

**Sec. 5270. Powers of commission—laws applicabl
authorization permit—motions for rehearing, review, appea**
(a) The public service commission is hereby vested with po
and authority and it shall be its duty to license, supervise
regulate every contract hauler in this state except as provide
section 5265 of this act and to approve schedules containing
minimum charges of such contract haulers and to presc
reasonable rules and regulations governing the filing and k
ing open for public inspection of such schedules: To presc
after hearing and upon complaint on its own initiative
minimum charge, or such rule, regulation or practice as it
judgment may be necessary and consistent with the pu
interest after giving due consideration to the cost of the ser
and providing that such minimum charges shall give no ad
tage or preference to any such contract hauler in competi
with any common carrier subject to this act.

* * * * * *

Sec. 5272. Annual license fee—allocation—penalty.
In addition to the regular registration license fee imposed o
motor vehicles in this state, and its personal property
every motor carrier, except as provided in section 5265 of
act shall, at the time of the issuance of a certificate of
venience and necessity and/or an interstate permit, and
nually thereafter, on or between January 1, and January
each calendar year, pay to the state treasurer of the sta
Missouri the annual license fee, as set out in this act, fo
maintenance and repair of the public highways; all such
levied upon the issuance of a license to any motor carrier fo
motor vehicle hereunder shall be reckoned from the begi
of the quarter in which such license was issued; *provided,
ever*, that no motor vehicle coming within the provisions o
act shall be used or licensed which has a greater dimensi
weight than is now or may hereafter be provided by law.
cases where the mileage of any route covered by any certi
of convenience and necessity and/or an interstate p

issued under the provisions of this act shall be in question, the Public Service Commission shall by order determine such question and the order of the Public Service Commission in such cases shall be final. For the purpose of determining the mileage of any such route, the certificate of the state highway commission, with respect to state highways, the county engineer, with respect to county or other highways not constituting a part of the state highway system, or of the streets of any municipal corporation, and in the case of streets in any municipal corporation, the certificate of any city engineer or mayor shall be accepted by the Public Service Commission as conclusive evidence. *Provided*, that where a motor carrier is operating within this and an adjoining state and the total mileage of said route in Missouri is ten miles or less, the license fee shall be one-third of the license fee hereinafter set out. *Provided further*, that where a motor carrier is operating a route in this state, the total mileage of which is not greater than twenty miles, the license fee shall be one-half of the license fee hereinafter set out. In case of emergency or usual temporary demand for transportation, the license fee or additional motor vehicle for limited periods shall be fixed by the Commission in such reasonable amount as may be prescribed by general or temporary order. The Commission, upon the issuance of a license for any vehicle, as defined in this act, shall notify the state treasurer who shall receive the license fee for such vehicle; and the Commission shall also notify the state treasurer of the number of lineal miles of route used by the owner of that vehicle and the number of miles in which it operates on state roads, the number of miles it operates on county roads and the number of miles it operates on city roads not maintained by the state highway commission, and the state treasurer shall distribute and credit to the state highway commission and to the proper county or city in the proportion that the number of lineal miles of route used by the licensed motor vehicle in each case bears to the number of lineal miles of route over which such carrier operates and the said funds so derived from said license shall be used for the maintenance and repair of the highways and streets over which said carrier operates.

(b) For each motor vehicle operating under a certificate of convenience and necessity or interstate permit as a passenger-carrying vehicle, the sum of ten dollars per passenger seat.

(c) In computing the annual license fee on each motor vehicle, trailer or semi-trailer, operating under a certificate of convenience and necessity or interstate permit as a freight-carrying vehicle, the vehicle shall be rated on the manufacturer's rated load capacity or the actual weight carrying capacity of the vehicle, which capacity shall be determined by the Public Service Commission at the time a certificate of convenience and necessity or interstate permit is issued. For each motor vehicle operating under a certificate of convenience and necessity or interstate permit as a freight-carrying vehicle, the annual license fee shall be as follows:

More than 1½ and not more than 2 tons	$25.00
More than 2 and not more than 3 tons	65.00
More than 3 and not more than 4 tons	100.00
More than 4 and not more than 5 tons	135.00
More than 5 and not more than 6 tons	175.00
More than 6 and not more than 7 tons	225.00
More than 7 and not more than 8 tons	275.00
More than 8 and not more than 9 tons	350.00
More than 9 tons	500.00

* * * * * *

Sec. 5274. Supervision and regulation—safety rules—accident reports—marking vehicles.—The Commission, in the exercise of the authority by this act vested in it, to license, supervise and regulate all motor carriers or contract haulers shall promulgate and mail or deliver to each holder of a certificate of convenience and necessity, interstate permit or contract hauler's permit hereunder, such safety rules and regulations as it may deem necessary to govern and control the operation of motor carriers or contract haulers over and along the public highways of this state, and the equipment to be used. Any such safety rules promulgated, in addition to any others deemed necessary by the Commission, shall include the following: (a) Every motor vehicle and all parts thereof shall be maintained

safe and sanitary condition at all times. (b) Every driver ployed by motor carriers or contract haulers shall be at t twenty-one years of age, of good moral character, and ll be fully competent to operate the motor vehicle under his rge. (c) Accidents arising from or in connection with the ration of motor carriers or contract haulers shall be reported the Commission in such detail and in such manner as the mmission may require. (d) The Commission shall require d every motor carrier or contract hauler shall have attached each unit or vehicle such distinctive marking as may be opted by the Commission. (e) No vehicle coming within e provisions of this act shall be operated at a speed in excess forty (40) miles per hour.

Sec. 5275. Penalties—misdemeanor.—Every owner, offi-r, agent, or employee of any motor carrier, contract hauler, d every other person, who violates or fails to comply with or o procures, aids or abets in the violation of any provision of is act, or who fails to obey, observe or comply with any order, cision, rule or regulation, direction, demand or requirement the Commission, and who procures, aids or abets any cor-ration or person in his failure to obey, observe or comply with y such order, decision, rule, direction, demand or regulation ereof shall be guilty of a misdemeanor and punishable by a e not exceeding one thousand dollars or by imprisonment in e county jail not exceeding one year, or by both such fine and prisonment.

Sec. 5276. Orders—service on carriers.—The orders and cisions of the Public Service Commission on the matters vered by this act shall be reduced to writing and a copy there-, duly certified, shall be served on the motor carrier and con-act hauler affected thereby through the United States mail, d such order and decision shall become operative and ef-ctive within thirty days after such service, and such motor rrier or contract hauler shall carry the provisions of said der into effect, unless said order is enjoined or set aside in a urt of proper jurisdiction.

Sec. 5277. Application of act.—It shall not be necessary the holder of any certificate of convenience and necessity or terstate permit, at the time of the effective date of this act to

make application for a certificate of convenience and necessity or an interstate permit under the provisions of this act. *Provided*, that the holder of every such certificate of convenience and necessity and/or interstate permit shall pay into the state treasury the fee, or fees required by section 5272 of this act, and in all other respects be subject to the provisions of this act. Every carrier, as in this act defined, actually operating in good faith, rendering satisfactory and dependable service by motor vehicle, on the first day of December, 1930, shall be presumed to be necessary for the public convenience and such carrier shall, in the absence of evidence overcoming such presumption, receive a certificate or permit for the routes established by them, or the territory they serve. *Provided*, nothing in this section shall be construed to prevent the Commission from revising or making a different rate of charge as provided in this act. *Provided, further*, that carriers engaged in bona fide operations, rendering satisfactory and dependable service, on the first day of December, 1930, shall have ninety days from the time this act becomes effective in which to file applications for certificates of convenience and necessity or permits and shall have the right to continue in operation until their applications have been decided by the commission.

Sec. 5278. Validation. If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court.

* * * * * *

Sec. 5280. **Legislation enacted for sole purpose of promoting and conserving interests and convenience of public.**— It is hereby declared that the legislation herein contained is enacted for the sole purpose of promoting and conserving the interests and convenience of the public, and that no right, privilege, or permit granted or obtained under or by virtue of this act shall ever be construed as a vested right, privilege, or

permit; and the general assembly retains full legislative power over, concerning and pertaining to the subject or subjects legislated upon in this act and the power and right to alter, amend or repeal this act at its pleasure. *Provided*, the provision of this act shall not apply to trucks of one and one-half ton capacity and less.

Approved May 6, 1931.

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ,

Appellant,

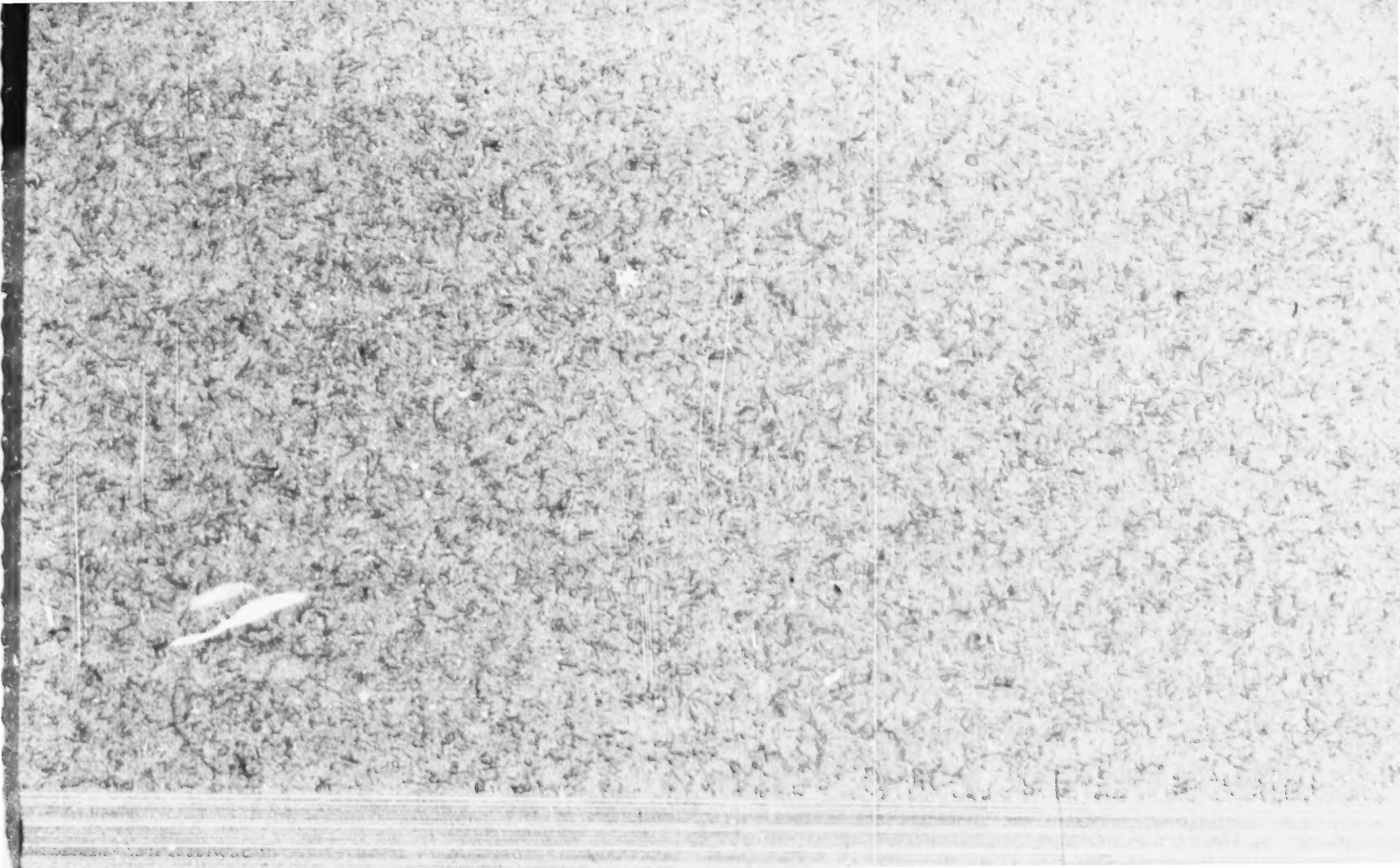
vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

MOTION FOR BOND.

JAMES H. LINTON,
DANIEL C. ROGERS,
Counsel for Appellees.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.,

Appellees.

MOTION FOR BOND.

Appellee Public Service Commission of the State of Missouri moves the Court to enter an order requiring appellant Frank Eichholz forthwith to file a bond in said cause in the amount of twenty-five thousand ($25,000.00) dollars, or in such lesser amount as the Court may deem adequate, to secure and protect appellee in the amount of fees now owing by appellant to the State of Missouri as compensation for the use of its public highways in interstate commerce.

PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI,
By JAMES H. LINTON,
General Counsel.
DANIEL C. ROGERS,
Assistant Counsel.

SUGGESTIONS IN SUPPORT OF MOTION.

Appellee states that the Three-Judge District Court, as shown by its decree, appearing on page 81 of the printed record in this cause, took jurisdiction of the counterclaim filed by appellee Public Service Commission. At that time, May 10, 1938, the District Court appointed a special master to take an accounting of accrued and accumulating license fees, and other legal charges, if any.

Thereafter, on October 26, 1938, after several hearings had been held before the special master, the District Court made and entered the following findings of fact, conclusions of law, and judgment on the counterclaim of the Public Service Commission of the State of Missouri:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION.

In Equity.

No. 660.

FRANK EICHHOLZ, *Plaintiff*,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI *et al.*, *Defendants*.

Findings of Fact, Conclusions of Law, and Judgment on the Counterclaim of Defendant, Missouri Public Service Commission, Against Plaintiff.

Having received and considered the Report of the Special Master appointed to take an accounting in connection with the Counterclaim of the Defendant, Missouri Public Service Commission, together with the evidence sent up by the Special Master, and having heard the arguments of counsel, the Court finds the facts as follows:

Findings of Fact.

1. The total number of vehicular operations of all classifications carried on by plaintiff and involved in Defendant's Counterclaim, on account of which the State of Missouri is entitled to fees, was 5875 operations.

2. Of the 5875 operations referred to in Finding of Fact No. 1, 3793 operations were 10-ton truck operations, subject to a payment of a $4.50 "Travel-order" fee for each operation, and 2082 were 9-ton truck operations subject to a payment of a $3.00 "Travel-order" fee for each operation.

3. The total amount due in fees to the State of Missouri for the operations referred to in Findings of Fact No. 1 and No. 2 is $23,314.50.

Conclusions of Law.

The Court concludes as a matter of law that the State of Missouri is entitled to fees upon the operations referred to in the Findings of Fact, calculated upon the "Travel-order" basis, at the rate of $4.50 per 10-ton truck operation and at the rate of $3.00 per 9-ton truck operation, and that the total amount due the State of Missouri for the operations involved in the Counterclaim of the Missouri Public Service Commission is $23,314.50.

Judgment on Counterclaim.

It Is Ordered, Adjudged and Decreed that the defendant, Missouri Public Service Commission, have and recover for the State of Missouri from the plaintiff, on the Counterclaim of the Defendant, the sum of $23,314.50, together with its costs.

Kimbrough Stone,
Circuit Judge.
Albert L. Reeves,
District Judge.
Merrill E. Otis,
District Judge."

Inasmuch as the District Court has entered a judgment on the counterclaim in favor of the Public Service Commission, on behalf of the State of Missouri, in the amount of twenty-three thousand three hundred fourteen dollars and fifty cents ($23,314.50), together with costs, it is suggested that equitable principles justify the request that this motion for adequate security against loss of license fees and costs should be sustained. One who seeks equity should be prepared to do equity.

Appellee states that two indemnifying bonds in the total amount of eleven thousand ($11,000.00) dollars have been filed by appellant in the District Court. The first bond in the separate amount of one thousand ($1,000.00) dollars was filed on February 22, 1937, very soon after the issuance of the temporary injunction by the District Court.

The second bond in the separate amount of ten thousand ($10,000.00) dollars was filed on or about February 23, 1938. Its condition is that,

> "Now, if the said Frank Eichholz shall pay all damages that may be occasioned by said restraining order or injunction and abide the decision which shall be made therein and pay all sums of money, damages and costs that shall be adjudged against him, if the injunction or restraining order be dissolved, then the above obligation to be void; otherwise to be and remain in full force and virtue."

Such second bond was required by the District Court upon hearing on the motion of Public Service Commission that plaintiff's (appellant's) first bond should be increased to twenty-five thousand ($25,000.00) dollars in order that the State of Missouri might be adequately protected and secured against loss of license fees for the use of the public highways by plaintiff (appellant) during the time he would use them, without paying any fees whatsoever, under the protection of the temporary restraining order. After hearing

statement of counsel of Public Service Commission in support of the higher bond and of counsel for Mr. Frank Eichholz against a bond in such higher amount, the District Court entered an order requiring the filing of an additional bond for only ten thousand ($10,000.00) dollars.

On October 26, 1938, approximately eight months after entry of its order for an additional bond in the amount of ten thousand ($10,000.00) dollars, the District Court, after reception of the report of the Special Master, entered its judgment on the counterclaim of the Public Service Commission of the State of Missouri in the amount of twenty-three thousand three hundred fourteen dollars and fifty cents ($23,314.50), together with costs, as heretofore stated.

It is reiterated that equitable principles justify this motion for a further increase in appellant's bond. No step has been taken by him to appeal from the amount of the judgment on the counterclaim. Evidently he accepts the amount itself not only as accurate and just, but as final. On page 14 of his brief appellant states:

> "Judgment on the counterclaim was also final. The act of ascertaining the amount due was a ministerial act in fulfillment of that judgment."

He concedes he owes the State of Missouri twenty-three thousand three hundred fourteen dollars and fifty cents ($23,314.50). He resists only the efforts of the Public Service Commission of the State of Missouri to recover such amount on behalf of the State. He seeks equity but is unwilling to do equity. Therefore, regardless of the outcome of the appeal on the injunction or the questions surrounding the counterclaim (*i. e.*, whether it lies within Equity Rule No. 30 or whether it can be maintained by the Public Service Commission or some other agent of the State of Missouri), the appellant should be required to place himself in a position to do equity to the State of Missouri for the amount of

money he concedes he owes to it, and as adjudged by the district court.

WHEREFORE, as a condition precedent to appellant's right finally to present his appeal to the Supreme Court of the United States, appellee prays said Court to require appellant to file such a bond as the Court deems sufficient to protect and secure the State of Missouri and this appellee in the premises.

PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI,
By JAMES H. LINTON,
General Counsel.
DANIEL C. ROGERS,
Assistant Counsel.

Service of within motion for bond and suggestions in support thereof is hereby acknowledged this 29th day of December, 1938.

D. D. MCDONALD,
FRANK E. ATWOOD,
SMITH B. ATWOOD,
Counsel for Appellant.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ, Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

PETITION FOR REHEARING

D. D. McDONALD,
SMITH B. ATWOOD,
Attorneys for Appellant,
Jefferson City, Missouri.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ, Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

PETITION FOR REHEARING

Comes now appellant, Frank Eichholz, and under the provisions of Rule 33 of this Court respectfully prays that this cause be reheard and reconsidered for the following reasons:

1. The Court did not rule upon appellant's contention that the statutory district court below was without jurisdiction to entertatin the counterclaim filed by appellee in said cause, and that as a consequence it had no jurisdiction to enter the following order and judgment relating thereto on May 10, 1938 (Transcript page 81):

> " * * * That the defendants are entitled to recover on their counterclaim from the plaintiff on behalf of the State of Missouri certain license fees and other charges accruing during the pendency of this suit and the effective period of the temporary injunction; * * *."

2. The Court seemingly has overlooked the rule of law that, to concede grounds of appellate jurisdiction for one purpose is to afford grounds for the review of all questions

properly raised on appeal, including those which do not in themselves afford grounds for appeal (Hartford Accident and Indemnity Co. vs. Southern Pacific R. R. Co., 273 U. S. 207, 217, 47 S. Ct. 357, 360.

3. The Court seemingly has overlooked the rule of law that questions of jurisdiction (of the subject matter in this case) may be raised at any stage of a proceeding, whether in the trial court, or on appeal, or on appeal from an interlocutory order before final judgment. (Harrison vs. Northern Securities Co., 197 U. S. 244, 287, 25 S. Ct. 493.)

The foregoing considerations were overlooked by the Court in affirming the judgment of the district court of May 10, 1938, without modifying said judgment on a matter upon which the district court had no jurisdiction to render a judgment. It is respectfully submitted that this contention, made in appellant's brief, will be apparent upon further consideration of the record, and that a full review of it will show that the judgment of the district court of May 10, 1938, finally fixed appellant's status as a judgment debtor, and finally adjudicated the **right of recovery** upon the counterclaim, as distinguished from the **amount of recovery**, which was not determined until a latter date.

Petitioner prays, for the reasons herein set forth, that the decree of the Court be vacated and the cause be reheard and reconsidered; or that the opinion be modified to include an adjudication of the matters and things herein referred to.

D. D. McDONALD,
SMITH B. ATWOOD,
Counsel for Appellant.

We certify that the foregoing petition is, in our opinion, well founded in law, and should be granted and is not interposed for delay.

D. D. McDONALD,
SMITH B. ATWOOD,
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

FRANK EICHHOLZ, ... Appellant,

vs. No. 367

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING

In this argument we do not present the question of appellant's right to appeal upon the question alone of the jurisdiction of the statutory district court to entertain the counterclaim in the case. Rather, our argument is postulated upon the proposition that, having admittedly acquired appellate jurisdiction of the cause for the purposes permitted under Section 380, Title 28, U. S. C. A., this court has jurisdiction to review all questions in the case, including those questions which, if standing alone, would afford no ground for invoking appellate jurisdiction. This court has authority to entertain such questions. (Hartford Accident & Indemnity Co., vs. Southern Pacific R. R. Co., 273 U. S. 207, 217, 47 S. Ct. 357, 360.)

Such a question was presented to this court in appellant's brief in presenting the question of the jurisdictiion of the statutory district court to entertain the counterclaim, and the question of the consequent authority to enter an order or decree of any kind thereon, whether the same be interlocutory or final. This court did not pass upon these questions. We think it should have done so. The reason for our contention is that if, as we contend, there was no jurisdiction to entertain the counterclaim below, there was no jurisdiction to make any order concerning it, or to refer it to a special master.

It follows that no judgment of any kind upon the special master's report could be sustained regardless of the finality of the decree of May 10, 1938. The unauthorized assumption of jurisdiction of the statutory court, and the subsequent appointment of a special master constitutes **a final determination of a substantive right of this appellant** which we contend should have been reviewed on this appeal along with a review of his right in equity to the injunction. If we reason correctly,

the entire counterclaim is thus disposed of. If we reason incorrectly, it is admitted we have nothing here for review except that part of the decree of May 10, 1938 denying the injunction.

Our position, then, depends logically upon answers to these questions:

First: Is an unauthorized exercise of jurisdiction subject to attack at any stage of a proceeding where the same appears of record?

Second: Is the jurisdiction of the statutory district court confined to the subject matter that occasioned its convocation?

Third: Does the subject matter of the counterclaim involve an issue necessary to, or separable from, the issue involved in appellant's right to the injunction?

Fourth: Are the answers to the above questions determinable from the transcript of the record in this case?

If the answers to the above questions are favorable to the appellant's contention we believe the court should pass upon his rights thus involved in its opinion. Taking these questions up in their order, we first submit that the right to question an unauthorized exercise of jurisdiction is never waived.

> "The mere decision of the tribunal, however, that it has authority to try and determine a case, when no such power exists in the court, does not give it the power. Its judgment may be questioned anywhere for want of jurisdiction. The jurisdiction of the court can never depend upon its decision of the merits of the case brought before it, but upon its right to determine and hear it at all." (Bailey on Jurisdiction, Vol. 1, Sec. 2.)

> "A judgment which the court had no authority to render must be reversed on appeal, regardless of the manner in which the higher court is informed of the lack of jurisdiction * * * ." (4 C. J. Appeal and Error Sec. 3179.)

Recognition of the principle that questions involving absence of jurisdiction need not await a final determination of the merits of the case gives occasion to the exercise of the extraordinary remedy of writ of prohibition. Whenever

therefore, appellate jurisdiction is otherwise properly invoked, questions of unauthorized exercise of original jurisdiction apparent from the record are properly presented and decided.

Second, it is but academic to say that the jurisdiction of Federal Courts, generally, is limited to those purposes enumerated in the federal constitution, and the statutes enacted pursuant thereto. Likewise, it is academic to say that, unless appellees could have maintained a separate suit on the counterclaim, it could not maintain it as such in this cause. (See Equity Rule 30, " * * * which might be the subject of an independent suit in equity * * * .")

The question therefore, may otherwise be propounded thus: May appellees have maintained a separate suit on the counterclaim before the statutory district court below? As thus propounded the answer appears obviously favorable to appellant's contention that the district court had no jurisdiction.

Furthermore, as indicated in authorities cited in appellant's brief (P. 28-29), the jurisdiction of the statutory district court is limited to the subject matter which is the occasion for its convocation. (Powell vs. U. S. 300 U. S. 276, 289, 57 S. Crt. 470, l. c. 477; Pittsburg vs. West Virginia Ry. Co. vs. U. S., 28 U. S. 479, 488, 50 Sup. Crt. 378, 381.) Such a subject matter in the bill as filed is injunctive relief. The subject matter of the counterclaim is a money demand—strictly an action at law, non-existent at the time the suit was instituted. (See allegation in first paragraph of counterclaim, transcript page 52-53.)

Third, the allegations of the counterclaim itself show clearly that the issues involved therein are distinct and separable from the issues involved in the injunction relief prayed for in the original bill. The one is an equitable cause of action; the other a legal cause of action, if it states a cause of action at all.

Fourth, the want of jurisdiction is apparent from the record. The subject matter which gave the statutory court jurisdiction appears from the allegations of the bill for injunction relief. (Transcript page 1, et seq.) The counterclaim speaks for itself, and shows that it is an action at law for the recovery of money (Transcript page 52-53). As heretofore stated, the allegations of the first paragraph admit that the cause of action did not arise until after the institution of the suit. The record shows that the court assumed jurisdiction

of the counterclaim, and entered a judgment adjudicating adversely upon the substantive rights of appellant (Transcript page 81). We think this was an unauthorized assumption of jurisdiction. That the extent to which appellant's rights were thus adversely affected could not be determined until the filing of the report of the special master, is beside the point. The fact remains that the status of appellant as a judgment debtor in some amount was fixed by the judgment of May 10, 1938 (appearing on page 81 of the Transcript). The judgment was to that extent void for want of jurisdiction.

We respectfully submit that this court has authority to so rule by virtue of its appellate jurisdiction obtained under Sec. 380, Title 28, U. S. C. A. The time having expired within which to appeal from the judgment on the counterclaim, we believe the court should rule on these questions in order that the rights of appellant in this respect may be preserved.

Respectfully submitted,

D. D. McDONALD,
SMITH B. ATWOOD,
Counsel for Appellant.

P. 3,

UPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1938.

Frank Eichholz, Appellant, *vs.* Public Service Commission of the State of Missouri et al.	Appeal from the District Court of the United States for the Western District of Missouri.

[February 27, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This is an appeal from a decree of the District Court, composed of three judges, holding valid an order of the Public Service Commission of Missouri which revoked appellant's permit as an interstate carrier, and denying a permanent injunction restraining the Commission and certain state officers from prosecuting suits against appellant for using the highways of the State in the transportation of property for hire in interstate commerce. 23 F. Supp. 587.

By a supplementary answer, the Public Service Commission pleaded a counterclaim for fees alleged to be due to the State for the use of its highways since the granting of the restraining order which was issued on the institution of the suit. The District Court adjudged the defendants entitled to recover on the counterclaim and appointed a special master to take the necessary accounting. As the decree is not a final one so far as the counterclaim is concerned, the appellees move to dismiss the appeal. The motion is denied. The decree denied a permanent injunction and this Court has jurisdiction of a direct appeal from that part of the decree by virtue of the express provision of the statute. Judicial Code, sec. 266; 28 U. S. C. 380. Compare *Public Service Commission* v. *Brashear Freight Lines*, decided February 13, 1939. See *Smith* v. *Wilson*, 273 U. S. 388, 390, 391; *Stratton* v. *St. Louis Southwestern Railway Co.* 282 U. S. 10, 14.

Since 1931 appellant, Frank Eichholz, has operated freight trucks in interstate commerce between the States of Missouri, Iowa and Kansas and has maintained terminal facilities in St. Louis, Missouri, Kansas City, Kansas, and other places in Kansas and Iowa.

Prior to the passage of the Federal Motor Carrier Act of 1935 (49 U. S. C. 301 *et seq.*), he obtained a permit from the Public Service Commission of Missouri "to operate as a freight carrying motor carrier over an irregular route" between points in Missouri and points beyond that State, "exclusively in interstate commerce". He did not seek or obtain from the Commission an intrastate permit.

On the passage of the federal act, appellant applied for a permit from the Interstate Commerce Commission and that application was still pending at the time of the hearing below and argument here.

When the state permit was granted, and thereafter, there was in force Rule No. 44 of the Public Service Commission which provided as follows:

"No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier accepts within Missouri a passenger whose destination is beyond the limits of the State of Missouri, such passenger shall not be permitted to terminate his trip within the State of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri".

In December, 1936, after hearing, the Commission revoked appellant's permit, holding this rule to have been violated. Its decision was based upon a finding that appellant had unlawfully engaged in intrastate commerce under the pretense of transacting interstate business; that as a subterfuge he had hauled freight originating in St. Louis, Missouri, and destined to Kansas City, Missouri, and *vice versa*, through his terminal in Kansas City, Kansas, which was located less than one-half mile from the Missouri state line. The Commission stated that the testimony showed an industrious solicitation by appellant for the transportation of freight between St. Louis, Missouri and Kansas City, Missouri, on the basis of his quoted interstate rate between such cities as set forth in his tariff filed with the Interstate Commerce Commission, which rate was much lower than the established rate for intrastate carriers operating between these cities, and that by such means a large volume of business had been developed. It appeared that he was

carrying freight at the interstate first-class rate of sixty cents per cwt. between St. Louis, Missouri, and Kansas City, Missouri, through his terminal at Kansas City, Kansas, while the similar intrastate freight rate established by the Public Service Commission between the two cities in Missouri was ninety-two cents per cwt.

On the challenge in this suit of the validity of the Commission's order, the District Court heard the evidence of the parties and found that the carriage of property from St. Louis, Missouri, to Kansas City, Missouri, and thence back into Kansas City, Missouri, for delivery, was not "the normal, regular or usual route" for shipping merchandise between the two cities in Missouri; that the route used by appellant to his terminal at Kansas City, Kansas, was through Kansas City, Missouri, and that the same traffic-ways were used in making deliveries of merchandise after it had been hauled in the first instance to the terminal; that after reaching the terminal in Kansas City, Kansas, appellant in many instances did not unload the merchandise, that much of such shipments was in carload lots, and that the method employed was to haul the merchandise to his terminal in Kansas City, Kansas, "where a new driver, either with the same tractor and trailer, or with another tractor and the same trailer, would return the merchandise to Kansas City, Missouri; that in some instances merchandise was actually unloaded at the depot in Kansas City, Kansas, and then distributed to the consignees in Kansas City, Missouri, but that this was "a negligible percentage of the shipment between Missouri points"; and that the method of operation which appellant employed was designed to afford shippers the benefit of a lower rate and was not in good faith.

First.—By Section 5268(a) of the Missouri Bus and Truck Act (Laws of 1931, pp. 307, 308), the State declared it to be unlawful for any common carrier by motor to furnish service within the State without first having obtained from the Commission a certificate of public convenience and necessity. By Section 5268(b) it was declared unlawful for any motor carrier (with certain exceptions not material here) to use any of the public highways of the State in interstate commerce without first having obtained a permit from the Commission. It was provided that in determining whether such a permit should be issued, the Commission should give consideration "to the kind and character of vehicles permitted over

said highway" and should require the filing "of a liability insurance policy or bond" in such sum and upon such conditions as the Commission might deem necessary to protect adequately the interest of the public in the use of the highway. The statute also authorized the Public Service Commission to prescribe regulations governing motor carriers.

Appellant's complaint did not attack these statutes; on the contrary he asserted that he had fully complied with their provisions. His complaint was of the order of the Commission revoking his permit. We confine ourselves to the question thus presented.

Second.—When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded. *Welch Company* v. *New Hampshire,* decided January 30, 1939; compare *McDonald* v. *Thompson,* decided December 5, 1938.

Third.—Appellant did not seek from the state commission a certificate entitling him to do an intrastate business. Under the Commission's rule, he had his choice either to refrain from carrying property between points in Missouri or to secure a certificate of public convenience and necessity as an intrastate carrier. The validity of the requirement of such a certificate to promote the proper and safe use of the state highways is not open to question. *Hendrick* v. *Maryland,* 235 U. S. 610, 622; *Morris* v. *Duby,* 274 U. S. 135, 143; *Clark* v. *Poor,* 274 U. S. 554, 556, 557; *South Carolina Department* v. *Barnwell Brothers,* 303 U. S. 177, 189; compare *Buck* v. *Kuykendall,* 267 U. S. 307, 315; *Interstate Busses Corporation* v. *Holyoke Railway Co.,* 273 U. S. 45, 51; *Sprout* v. *South Bend,* 277 U. S. 160, 169.

Rule 44 was plainly designed to provide a safeguard against the use of an interstate permit to circumvent the requirement of a certificate for intrastate traffic. The rule simply sought to hold to his choice the one who had sought and obtained a permit exclusively for interstate transportation. Appellant was entirely free to conduct that transportation if he did not engage in the intrastate business for which he had deliberately refrained from qualifying himself. We cannot see that the rule on its face imposed any improper burden upon interstate commerce and the question is

ether it did so through the application that the Commission
made of it.

Appellant insists that the hauling from St. Louis over the state
e to Kansas City, Kansas, of merchandise consigned to persons
Kansas City, Missouri, and hauling it back again to its intended
tination in Kansas City, Missouri, was actually interstate trans-
rtation. *Hanley* v. *Kansas City Southern Railway Company*,
7 U. S. 617; *Western Union Telegraph Co.* v. *Speight*, 254 U. S.
; *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404. That fact,
wever, does not require the conclusion that the State's action for
e protection of its intrastate commerce was invalid. See *Lone
ar Gas Company* v. *Texas*, 304 U. S. 224, 238. We may assume
at Congress could regulate interstate transportation of the sort
re in question, whatever the motive of those engaging in it. But
the absence of the exercise of federal authority, and in the light
local exigencies, the State is free to act in order to protect its
gitimate interests even though interstate commerce is directly
ffected. *Cooley* v. *Board of Wardens*, 12 How. 299, 319; *Morgan's
. S. Co.* v. *Louisiana*, 118 U. S. 455; *Smith* v. *Alabama*, 124 U. S.
65; *Kelly* v. *Washington*, 302 U. S. 1, 9, 10. If appellant's haul-
ng of the merchandise in question across the state line was not in
ood faith but was a mere subterfuge to evade the State's require-
ment as to intrastate commerce, there is no ground for saying that
he prohibition of the use of the interstate permit to cover such
transactions, and the application of the Commission's rule pro-
hibiting them in the absence of an intrastate certificate, was an un-
warrantable intrusion into the federal field or the subjection of
interstate commerce to any unlawful restraint. And if the pro-
hibition of such transactions was valid, the Commission was un-
doubtedly entitled to enforce it by revoking appellant's permit for
breach of the condition upon which it was issued and accepted by
appellant.

Fourth.—The ultimate question is thus one of fact, whether the transactions of appellant were of the character described by the Commission and in the findings of the District Court.

The transcript of the record before the Commission was introduced before the court, but neither that evidence nor the additional evidence taken by the court is presented *in extenso* by the record here. The parties properly filed, in connection with this appeal,

condensed statements of the evidence upon which they respectively relied. An examination of these statements discloses no reason for disturbing the court's findings.

Appellant stresses the fact that he had selected his terminal in Kansas City, Kansas, at the beginning of his operations as a motor carrier, about 1932, and that it was a convenient and proper location. But that fact does not alter the nature of the transactions under review. There was a variance in the testimony as to the extent of the appellant's business which was conducted in violation of his permit, but there was adequate basis for the court's finding that it was a considerable portion of his operations and justified the action of the Commission.

The decree of the District Court is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.